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U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 175

(T.D. 94–22)

DECISION ON DOMESTIC INTERESTED PARTY PETITION CONCERNING CLASSIFICATION OF LOAD ROLLER PRODUCTS FOR FORK LIFT TRUCKS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final interpretive rule.

SUMMARY: This document advises the public of Customs decision granting a domestic interested party petition concerning the classification of certain load roller products for fork lift trucks. Customs has previously ruled that the products were classified as parts of fork lift trucks in heading 8431, Harmonized Tariff Schedule of the United States (HTSUS). The petition requests a determination by Customs that the products be classified as radial ball bearings in heading 8482, HTSUS. After careful analysis of the petition and the comments received, Customs is of the opinion that the products are classified as ball bearings in subheading 8482.10.50, HTSUS.

DATE: This decision will be effective as to merchandise entered, or withdrawn from warehouse, for consumption, on or after April 29, 1994.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Metals and Machinery Classification Branch, U.S. Customs Service, (202–482–7030).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 28, 1992, a notice was published in the Federal Register (57 FR Part 39158), stating that Customs had received a petition on behalf of a domestic interested party, filed under section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), and Part 175, Customs Regulations (19 CFR 175). The petition requested a determination by Customs that certain load roller products for fork lift trucks were classifiable as radial ball bearings in subheading 8482.10.50, HTSUS, subject to a Column 1 General rate of duty of 11 per cent, *ad valorem*.

In HQ 087775, dated January 17, 1991, Customs held that the load roller products were classified as parts of fork lift trucks in subheading 8431.20.00, HTSUS, subject to a Column 1 free rate of duty. HQ 087775 was affirmed by HQ 088888, dated March 24, 1992. The products were described in HQ 088888 as steel tires into which assemblies containing rolling elements are incorporated. The tires are designed to turn in the channels of fork lift mast uprights. The products are manufactured in two configurations. The first configuration is comprised of a separate, reinforced tire into which inner and outer rings containing rolling elements are installed. The steel tire of the second configuration is manufactured integrally with the outer ring section it incorporates.

In HQ 088888, Customs noted that the products are referred to by many names including "load rollers", "wheels", "bearings", "guide wheels", "mast guide bearings" and "rollers". Customs stated the belief that the products are similar in form and function to certain lifting and handling equipment components which are not described as ball bearings. It was also noted that the products may incorporate bearing components but, as a whole, Customs believed the products were not mere ball bearings.

The petitioner contends that the products should be classified as ball bearings in subheading 8482.10.50, HTSUS. The petitioner argues that the products are ball bearings of special configuration described by heading 8482, that Customs placed undue emphasis on the outer tire component of the products, and that the products are excluded from heading 8431 by Section XVI, Note 2, HTSUS.

COMMENTS

Pursuant to section 175.21(a), Customs Regulations (19 CFR 175.21 (a)), before making a determination on this matter, Customs invited written comments from interested parties on this issue.

Only one commenter submitted arguments in response to the Federal Register notice dated August 28, 1992. The commenter supported the correctness of the current classification of the products in heading 8431, HTSUS. The commenter argued that the outer tires of the products are not designed like an outer bearing race, that the reducing of friction is a secondary function of the products, and that trade literature describes the products as a type of "roller", and not a type of bearing.

DECISION ON PETITION

After careful analysis of the petition and the comments received in response to the notice of August 28, 1992, Customs is of the opinion that the products should be classified as radial ball bearings in subheading 8482.10.50, HTSUS, subject to a Column 1 General rate of duty of 11 per cent *ad valorem*.

Customs is presented with a unique article of commerce which is entered in two configurations. In the first configuration, the steel tire section is machined to function as the outer bearing race. This integral tire configuration is quite similar to heavy duty cam followers, such as those

which roll in channels in aircraft wings. It has been Customs position for some time that cam followers function as ball or roller bearings, are commonly known as bearings and are properly classified as bearings.

The second configuration contains a thick outer steel tire enclosing a thinner steel ring. This second ring is the part that has been machined to function as the bearing outer race. This separate tire configuration has some similarities in construction to products such as trolley wheels, roller skate wheels and furniture drawer glides, which are considered to be articles containing bearings and are not themselves classified as ball bearings. The second configuration of load roller product, however, performs the same function as the integral tire configuration. Both configurations of the product are of the same class or kind of merchandise, and should be classified in the same provision under the HTSUS.

Through the course of this proceeding, including a continuing analysis of the petitioner's submissions, the commenter's submissions and our own research, we have reached a number of conclusions which have progressed from our conclusions in prior rulings on the merchandise.

Central to our previous position was the fact that mast guide bearings came in two separate configurations, as previously described. The first version, presented to us in a ruling request, and deemed the "integral tire" configuration, had the design characteristics most commonly associated with ball bearings, namely, an outer and inner ring separated by a row of spaced balls or rolling elements. While the thickness of the outer ring was significantly greater than that normally found on most bearings, it did conform to the design structure of a cam follower. In the past, Customs has uniformly held to the position that cam followers were classifiable as antifriction bearings.

The second version, deemed the "external tire" configuration of the mast guide bearing, was originally referred to by the importer as a load roller. It was viewed as a component of a fork lift which contained a bearing. Articles containing bearings are normally classifiable as parts of whatever finished article they are incorporated into.

Our emphasis on what functions as the outer race is based on our understanding of the construction and operation of antifriction ball bearings. The critical elements of such bearings are the uniformity and smoothness of the balls, as well as the degree of precision grinding, honing and polishing of the races. The term "races" refers to the machined grooves, or tracks, that are cut into the metal surfaces of the inner and outer rings. A bearing is assembled by loading the balls between the two rings and normally separating the balls from each other by using either metal or nylon retainers called cages. The balls ride in the groove created by the upper and lower races.

Normally, a bearing is installed into some type of housing in which the outer ring is held stationary. A rotatable shaft or axle is then press fit into the inner ring. The result is that all of the rotational movement of the shaft is transferred to the balls. The balls also support the shaft load. It is much less common to have an application in which the inner ring

remains stationary and the outer ring rotates. A standard ball bearing cannot be used as a load-supporting wheel. The outer ring, not being reinforced, would tend to distort itself trying to carry weight. When bearings are used in this manner, they are inevitably pressed inside other devices, such as gears, pulleys or wheels. As such, the bearing tends to lose its own identity and take on the identity of the completed assembly. Devices such as cam followers are the exception to this rule. In that case, the outer ring is significantly reinforced in thickness to provide the necessary support. The ring is still machined internally to create the smooth precisioned raceway needed to reduce friction.

It was the original position of the Customs Service that the primary function of the mast guide bearing was to act as a guide wheel, not as a friction-reducing bearing. While we acknowledged the structural similarity of the "integral tire" bearing configuration to that of a cam follower, Customs believed that the two did not share a common use and function. Customs grouped mast guides into the same category as other articles regarded as being non-bearing types, such as trolley wheels, furniture drawer guides, and roller skate wheels. These articles shared a structural identity with the "external tire" bearing configuration and also, in our opinion, a functional similarity.

Additional information supplied by the petitioner indicates that cam followers are used in applications of which we were previously unaware. It is now clear that cam followers are capable of being used as track guides on heavy machinery. We now view construction and engineering principles relating to the "external tire" bearing configuration as supporting petitioner's claim. Previously, Customs placed far too much significance on differences in the design of the two versions of the mast guide bearing. We likened the "external" tire configuration to other articles that were held to contain ball bearings, rather than being ball bearings themselves. We looked at the construction of this "external" tire version and saw two separate components: a complete ball bearing composed of an inner ring, balls, and a thin-section outer ring; and a separate tire into which the bearing was pressed. Upon closer examination, what we have, in reality, is a two-part outer ring. In order to load additional balls into this assembly, which is done to maximize the load handling capacity of the mast guide, the designers had to split the outer ring. By cracking the outer ring and spreading it apart, additional balls could be added. This would be impossible to do with the first, integral tire version. The outer ring of that bearing was more than ½ inch thick. Splitting it would ruin the unit. Instead, a much thinner steel liner, which we originally referred to as the outer ring of the external tire version, was used. This liner was machined to create the bearing race, but was thin enough to split. Thus, additional balls could be added and this assembly inserted into the tire. This was not an assembly of two different components, unlike other devices such as pulleys and gears. Instead, it was an engineering solution that resulted in a maximum complement ball bearing, and not a component containing a ball bearing.

In a recent decision, *THK America, Inc. v. United States,* Slip Op. 93–207, decided November 1, 1993, the Court of International Trade held that certain linear motion guide systems were ball bearings of heading 8482. The Court noted that the term "ball bearing" was not defined either in the statute or its legislative history, and that it was therefore proper for the Court to aid its own understanding of the term by reference to dictionaries, lexicons and scientific authorities. One of the sources consulted was The McGraw-Hill Encyclopedia of Science & Technology, in which antifriction bearings, of which ball bearings are a subgroup, were defined as "A machine element that permits free motion between moving and fixed parts. Antifriction bearings are essential to mechanized equipment: they hold or *guide* moving machine parts and minimize friction and wear." (Emphasis original). By function and design, the load roller products under consideration both guide the lifting forks as they move along the lift mast uprights which are fixed in place, and minimize the friction caused by this movement.

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. In accordance with the above analysis, we find that the load roller products are provided for, by name, as ball bearings, in heading 8482. Tariff provisions designating an article or a class of articles *eo nomine,* by name, will include all forms of the named article in the absence of a contrary legislative intent, judicial decision, or administrative practice. *Nootka Packing Co. v. United States,* 22 CCPA 464, T.D. 47464 (1935).

Under the authority of GRI 1, the fork lift load roller products are provided for as ball bearings in heading 8482. They are classifiable as other ball bearings, in subheading 8482.10.50, HTSUS.

Because they are parts which are goods included in a heading in Chapter 84, these products are precluded from classification in heading 8431 by virtue of Section XVI, Note 2(a), HTSUS. This note states, in relevant part, that parts which are goods included in any of the headings of chapters 84 and 85, are in all cases to be classified in their respective headings. HQ 087775, dated January 17, 1991, and HQ 088888, dated March 24, 1992, which held that the products are classified in heading 8431 as parts of fork lift trucks, are revoked by this document.

In summary, a thorough review of the evidence of record leads to the following factual and legal conclusions: both the first and second configuration of load roller products are in all material respects indistinguishable from cam followers, which Customs uniformly regards as ball bearings; both configurations are within the common meaning of the term "ball bearing"; for this reason, both configurations are provided for, *eo nomine,* by name, in heading 8482, noting that *eo nomine* designations in most cases will include all forms of the named article.

For these reasons, the fork lift load roller products under consideration are classified as "[B]all * * * bearings * * * : Ball bearings: * * * Other", in subheading 8482.10.50, HTSUS. This decision will stand in the absence of a contrary judgment rendered by the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit or the United States Supreme Court.

AUTHORITY

This notice is published under the authority of section 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and section 175.24, Customs Regulations (19 CFR 175.24).

DRAFTING INFORMATION

The principal author of this document was James A. Seal, Metals and Machinery Classification Branch, Office of Regulations and Rulings, U.S. Customs Service. Personnel from other Customs offices participated in its development.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: February 28, 1994.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 22, 1994 (59 FR 13450)]

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19 CFR Parts 4, 123, 141 and 173

(T.D. 94–24)

TECHNICAL CORRECTIONS TO THE CUSTOMS REGULATIONS RELATING TO CUSTOMS MODERNIZATION

RIN 1515–AB36

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by making certain technical corrections necessitated by the Customs Modernization provisions of the North American Free-Trade Agreement Implementation Act (the NAFTA Act), which went into effect when signed on December 8, 1993. All corrections are to legal authority citations, which do not involve changes in substantive legal requirements. All vessel and entry clearance regulatory provisions remain in effect.

EFFECTIVE DATE: March 21, 1994.

FOR FURTHER INFORMATION CONTACT: Gregory R. Vilders, Regulations Branch (202) 482–6930.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Customs Modernization provisions contained in Title VI of the North American Free-Trade Agreement Implementation Act of 1993, Public Law 103–182, 107 Stat. 2057 (the NAFTA Act), went into effect when the NAFTA Act was signed on December 8, 1993 (§ 692 of the NAFTA Act). Two provisions of the NAFTA Act require that technical corrections be made to the Customs Regulations immediately: §§ 618 and 690. Sections 618 and 690 repeal more than 50 provisions in titles 19, 26, and 46 of the United States Code and the Revised Statutes of the United States to streamline and allow for the automation of Customs commercial operations; however, it should be noted that the legal requirements pertaining to vessel entry and clearance remain in effect under other statutory provisions.

REPEALED PROVISIONS

In title 19 of the U.S. Code, 22 sections were repealed: §§ 432, 435, 437, 439, 440, 443, 444, 445, 465, 482, 521, 583, and 585 of the Tariff Act of 1930 (19 U.S.C. 1432, 1435, 1437, 1439, 1440, 1443, 1444, 1445, 1465, 1482, 1521, 1583, and 1585), and §§ 3111, 3118, 3119, 3122, 3124, 3125 of the Revised Statutes of the United States (19 U.S.C. 282, 286, 287, 290, 291, 292), the last undesignated paragraph of § 201 of the Act of August 5, 1935 (19 U.S.C. 1432a), the Act of June 16, 1937 (19 U.S.C. 1435b), and so much of § 2792 of the Revised Statutes of the United States as was codified at 19 U.S.C. 289 and 46 U.S.C. App. 110 and 112 on December 8, 1993 (the date this Act was enacted).

In title 26 of the U.S. Code, a note to § 4461, relating to § 1403(b) of the Water Resources Development Act of 1986 (Public Law 99–662, 26 U.S.C. 4461 note), was repealed.

In title 46 of the U.S. Code, more than 20 sections were repealed: §§ 4198, 4199, 4201, 4208, 4213, 4222, 4306, 4307, 4308, 4332, 4348, 4358, 4361, 4362 through 4369, 4573 through 4576 of the Revised Statutes of the United States (46 U.S.C. App. 94, 93, 96, 102, 101, 126, 351 through 353, 274, 293, 306, 307, 308 through 315, 674 through 677), and § 4207 of the Revised Statutes of the United States, § 1 of the Act of February 10, 1900 (46 U.S.C. App. 131), § 2 of the Act of April 29, 1908 (46 U.S.C. App. 127), § 1 of the Act of July 1, 1916 (46 U.S.C. App. 130) §§ 1 and 2 of the Act of July 3, 1926 (46 U.S.C. App. 293a and 293b), the Act of May 4, 1934 (46 U.S.C. App. 91a), and so much of § 4221 as was codified at 46 U.S.C. App. 113 on December 8, 1993 (the date this Act was enacted).

CONTINUED AUTHORITY FOR
REGULATORY REQUIREMENTS AND REGULATORY CHANGES

Repeal of these statutory provisions affects the following four parts of the Customs Regulations: parts 4, 123, 141, and 173 (19 CFR parts 4, 123, 141, and 173). However, continued legal authority for existing vessel entry and clearance regulatory provisions is found at 19 U.S.C. 1431,

1433, 1434, 1436 and/or 46 U.S.C. App. 91, as amended. (See, § 611 of the NAFTA Act, which amends 19 U.S.C. 1436, and § 686 of the NAFTA Act, which amends § 4197 of the Revised Statutes, as amended (46 U.S.C. App. 91) and deletes certain obsolete language from other provisions, to consolidate vessel clearance requirements, establish the basic requirements for clearance, and specify circumstances when all requirements need not be met. Further, § 686 amends 46 U.S.C. App. 91 to give the Secretary authority to prescribe by regulation the manner in which clearance is to be obtained, including the documents, data, or information which must be submitted or electronically transmitted to obtain clearance).

In part 4, the legal authority references for the following 14 sections are amended: §§ 4.3, 4.6, 4.7, 4.7a, 4.9, 4.12, 4.15, 4.16, 4.39, 4.81, 4.84, 4.85, 4.86, 4.94 (19 CFR §§ 4.3, 4.6, 4.7, 4.7a, 4.9, 4.12, 4.15, 4.16, 4.39, 4.81, 4.84, 4.85, 4.86, 4.94). The general authority citation for part 4 is also amended.

In part 123, the legal authority reference for § 123.11 (19 CFR 123.11) is amended.

In part 141, a legal reference cited in § 141.83 (19 CFR 141.83) is amended.

In part 173, the general legal authority for the part is amended.

These various sections are amended to correct the legal authority citations by deleting references to those provisions repealed by the NAFTA Act wherever they are cited as an underlying statutory authority for the regulatory provision. It should also be noted that further amendments to the Customs Regulations will be made in the near future to conform them to other changes mandated by the Customs Modernization provisions of the NAFTA Act.

Following is a summary of the present regulatory changes:

DISCUSSION OF CHANGES

Part 4:

1. The specific authority citations for §§ 4.6, 4.15, and 4.16 are deleted because they reference 19 U.S.C. §§ 1585, 46 U.S.C. App. 310, and 19 U.S.C. 1435b, respectively, as the only other authority for their provisions, and these provisions were repealed by § 690 of the NAFTA Act. While continued authority for these regulatory provisions is found at 19 U.S.C. 1433, 1434, and 46 U.S.C. App. 91, the reference to this continued authority is carried under the general authority citation for part 4, which is revised to include §§ 1433 and 1434 of title 19, and § 91 of title 46.

2. The specific authority citations for §§ 4.3, 4.7, 4.7a, 4.9, 4.12, 4.39, 4.81, 4.84, 4.85, 4.86, and 4.94 are revised because they variously reference sections in title 19—§§ 1432, 1435, 1437, 1439, 1440, 1443, 1444, 1465, 1583—and/or sections in title 46—313, 314, 674—that were repealed by § 690 of the NAFTA Act. Accordingly, the repealed statute is deleted from the specific authority citation. While continued authority for these regulatory provisions is found at 19 U.S.C. 1431, 1433, 1434,

and/or 46 U.S.C. App. 91, the reference to this continued authority is carried under the general authority citation to part 4, which is further revised to include § 1431 of title 19.

3. In § 4.3(a), footnote 10 is deleted because it carries text of 46 U.S.C. App. 91a, which was repealed by § 690 of the NAFTA Act. While continued authority for this regulatory provision is found at 19 U.S.C. 1434 and/or 46 U.S.C. App. 91, for the reason given at 1 above, such reference is carried under the general authority citation to part 4.

4. In § 4.9, the reference to 19 U.S.C. 1435 is deleted from paragraphs (a) and (c) because § 1435 was repealed by § 690 of the NAFTA Act. As the entry and certification requirements are now consolidated under the provisions of 19 U.S.C. 1434, paragraphs (a) and (c) are revised to reference § 1434.

5. In § 4.15(a), the first and second paragraphs of footnote 28 are deleted because they carry text of 46 U.S.C. App. 310 and text of 46 U.S.C. App. 311, respectively, both of which were repealed by § 690 of the NAFTA Act. Although continued authority for this regulatory provision is found at 19 U.S.C. 1433 and/or 46 U.S.C. App. 91, for the reason given at 1 above, such reference is carried under the general authority citation to part 4.

6. In § 4.60(a), the second paragraph of footnote 90 is deleted because it carries text of 46 U.S.C. App. 91a, which was repealed by § 690 of the NAFTA Act. However, because the second paragraph of footnote 90 also carries a cross-reference to § 4.87 of the Customs Regulations (19 CFR 4.87), the cross-reference is maintained. Continued authority for this regulatory provision is found at 46 U.S.C. App. 91.

7. In § 4.85, footnotes 116 and 117 are deleted because they carry text of 19 U.S.C. 1443 and 1445 (in paragraphs (a) and (b)), and text of 19 U.S.C. 1444 (in paragraph (c)), respectively, which were repealed by § 690 of the NAFTA Act. Although continued authority for this regulatory provision is found at 19 U.S.C. 1433 and 1436 and/or 46 U.S.C. App. 91, for the reason given at 1 above, such reference is carried under the general authority citation to part 4.

8. In § 4.94, the parenthetical legal authority citations at the end of the section are removed because they are duplicative; the legal authority for this section is already enumerated under the specific authority citation section at the beginning of the part (recall the revision of this specific authority section discussed under paragraph 2 above).

Part 123:

9. The specific authority citation for § 123.11 is deleted because it references 19 U.S.C. § 1465 as the only other authority for its provision, and this provision was repealed by § 690 of the NAFTA Act. While continued authority for this regulatory provision is found at 19 U.S.C. 1431, the reference to this continued authority is carried under the general authority citation for part 123, which is revised to include § 1431.

Part 141:

10. In § 141.83, the reference to 19 U.S.C. § 1465 in paragraph (d)(11) is deleted because § 1465 was repealed by § 690 of the NAFTA Act.

Part 173:

11. In the general authority citation for part 173, the reference to 19 U.S.C. § 1521 is deleted because § 1521 was repealed by § 618 of the NAFTA Act.

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT REQUIREMENTS, DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Inasmuch as these amendments merely conform the Customs Regulations to existing law, pursuant to 5 U.S.C. 553(a)(2) and (b)(B), good cause exists for dispensing with notice and public procedure thereon as unnecessary. For the same reason, good cause exists for dispensing with the requirement for a delayed effective date, under 5 U.S.C. 553(a)(2) and (d)(3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.).* This amendment does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Gregory R. Vilders, Regulations Branch. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 4

Bonds, Cargo vessels, Customs duties and inspection, Fishing vessels, Imports, Maritime carriers, Merchandise, Passenger vessels, Reporting and recordkeeping requirements, Vessels, Yachts.

19 CFR Part 123

Administrative practice and procedure, Bonds, Canada, Customs duties and inspection, Freight, Imports, Mexico, Railroads, Reporting and recordkeeping requirements, Vehicles, Vessels.

19 CFR Part 141

Customs duties and inspection, Entry procedures, Invoices, Reporting and recordkeeping requirements.

19 CFR Part 173

Administrative practice and procedure, Customs duties and inspection.

AMENDMENTS TO THE REGULATIONS

Parts 4, 123, 141, and 173 of the Customs Regulations (19 CFR Parts 4, 123, 141, and 173) are amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for part 4 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91;

2. The specific authority references for §§ 4.6, 4.15, and 4.16 are removed, and the specific authority citations for §§ 4.3, 4.7, 4.7a, 4.9, 4.12, 4.39, 4.81, 4.84, 4.85, 4.86, and 4.94 are revised to read as follows:

* * * * * * *

Section 4.3 also issued under 19 U.S.C. 288, 1441; 46 U.S.C. App. 111;

* * * * * * *

Section 4.7 also issued under 19 U.S.C. 1581(a); 46 U.S.C. App. 883a, 883b;

Section 4.7a also issued under 19 U.S.C. 1498, 1584;

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Section 4.9 also issued under 42 U.S.C. 269; 46 U.S.C. App. 677;

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Section 4.12 also issued under 19 U.S.C. 1584;

* * * * * * *

Section 4.39 also issued under 19 U.S.C. 1446;

* * * * * * *

Section 4.81 also issued under 19 U.S.C. 1442, 1486; 46 U.S.C. 251, 883;

* * * * * * *

Section 4.84 also issued under 46 U.S.C. App. 883–1;

Section 4.85 also issued under 19 U.S.C. 1442, 1623;

Section 4.86 also issued under 19 U.S.C. 1442;

* * * * * * *

Section 4.94 also issued under 19 U.S.C. 1441; 46 U.S.C. App. 104;

* * * * * * *

§ 4.3 [AMENDED]

3. In § 4.3, paragraph (a) is amended by removing the "10" footnote.

§ 4.9 [AMENDED]

4. In § 4.9, paragraph (a) is amended by removing the reference "section 435, Tariff Act of 1930 (19 U.S.C. 1435)" in the fourth sentence and adding, in its place, the reference "section 434, Tariff Act of 1930 (19 U.S.C. 1434)"; and paragraph (c) is amended by removing the reference "section 435, Tariff Act of 1930 (19 U.S.C. 1435)" and adding, in its place, the reference "section 434, Tariff Act of 1930 (19 U.S.C. 1434)".

§ 4.15 [AMENDED]

5. In § 4.15, paragraph (a) is amended by removing the first two paragraphs of the "28" footnote.

§ 4.60 [AMENDED]

6. In § 4.60, paragraph (a) is amended by removing the last paragraph in the "90" footnote and adding, in its place, the reference "(For clearance via domestic ports, see § 4.87).".

§ 4.85 [AMENDED]

7. In § 4.85, paragraphs (a) and (b) are amended by removing the "116" footnote; paragraph (c) is amended by removing the "117" footnote.

§ 4.94 [AMENDED]

8. In § 4.94 the parenthetical legal authority citations at the end of the section are removed.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The general authority citation for part 123 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States (HTSUS)), 1431, 1624;

* * * * * * *

PART 141—ENTRY OF MERCHANDISE

1. The general authority citation for part 141 continues to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624;

* * * * * * *

§ 141.83 [AMENDED]

2. In § 141.83, paragraph (d)(11) is amended by removing the words "465 or" and "1465 or".

PART 173—ADMINISTRATIVE REVIEW IN GENERAL

1. The general authority citation for part 173 is revised to read as follows:

Authority: 19 U.S.C. 66, 1501, 1520, 1624.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: March 1, 1994.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 21, 1994 (59 FR 13198)]

19 CFR Part 175

(T.D. 94–25)

TARIFF CLASSIFICATION OF DOWN COMFORTERS; NOTICE OF CUSTOMS DECISION ON A DOMESTIC INTERESTED PARTY PETITION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Customs decision on domestic interested party petition.

SUMMARY: Customs has held in certain rulings regarding down comforters with an outer shell of cotton that the outer shell determines the classification and the textile category of the comforters at the subheading level of the Harmonized Tariff Schedule of the United States (HTSUS). A domestic interested party claims that the down filling imparts the essential character to these comforters and thus believes the comforters should be classified at a different subheading level, resulting in a higher rate of duty. This document advises the public that Customs, after soliciting comments from the public and analyzing them, has decided to grant the domestic party petition.

DATE: This decision will be effective as to merchandise entered for consumption, or withdrawn from warehouse for consumption, after April 29, 1994.

FOR FURTHER INFORMATION CONTACT: Craig Clark, Commercial Rulings Division, U.S. Customs Service, (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 27, 1993 Customs published a notice in the Federal Register (58 FR 30726), inviting public comments concerning a domestic interested party petition, filed pursuant to section 516, Tariff Act of 1930, as amended (19 U.S.C. § 1516). The petition related to the tariff classification of certain down comforters.

Heading 9404, Harmonized Tariff Schedule of the United States (HTSUS), provides for articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered.

In HQ 084000 (June 16, 1989) Customs held that a down comforter was classified as an article of bedding and similar furnishing, other, other, of cotton, not containing any embroidery, lace, braid, edging, trimming, piping exceeding 6.35 millimeters or applique work in subheading 9404.90.80, HTSUS, subject to a Column 1 rate of duty of 5 percent *ad valorem* and textile category 362. This down comforter had a shell made

of 100 percent cotton fabric, a filling of white goose down, and a piping of less than 6.35 millimeters on all four edges.

In HQ 086080 (February 9, 1990) Customs held that a down comforter was classified in subheading 9404.90.80, HTSUS, subject to a Column 1 rate of duty of 5 percent *ad valorem* and textile category 362. This down comforter had a 100 percent woven quilted shell and a filling of 100 percent goose down, but had no external decorative work.

In HQ 084000 and HQ 086080 Customs has determined, therefore, that it is the outer cotton shell that determines the classification of these down comforters at the subheading level, making them classifiable as "of cotton."

The petitioner contends that it is the down filling, and not the outer cotton shell, that imparts the essential character in application of General Rule of Interpretation (GRI) 3(b) to the down comforters and that should determine the classification at the subheading level. Consequently, the petitioner submits that the proper classification of the down comforters with cotton covers is as in subheading 9404.90.90, HTSUS, a residual provision within heading 9404, subject to a duty rate of 14.5 percent *ad valorem*.

Summary of Comments

Twenty-six (26) comments were received in response to the Federal Register notice. Of these comments, twenty-three (23) were in support of the petition, and three (3) were in opposition to it.

Of those supporting the petition, the following arguments were made: there are important policy reasons why the down filling should determine classification at the subheading level for down comforters; there are prior Customs rulings which support the petitioner's position; the terms of the HTSUS support classifying articles of Heading 9404 according to the inner filling; and the essential character of down comforters is provided by the down filling.

Of those opposing the petition, the following arguments were made: down comforters should take the same duty rate under the HTSUS as they did under the TSUS; the terms of the HTSUS support classifying articles of Heading 9404 according to the outer shell by the application of GRI 1; and by the application of GRI 3(b) the essential character is provided by the outer shell.

Analysis of Comments

Many of the commenters in support of the petition stated that there are important policy considerations for changing the classification of down comforters. These considerations are beyond the scope of our review.

One commenter who opposed the petition stated that under the Tariff Schedules of the United States (TSUS), down comforters were dutiable at 5 percent *ad valorem*. Since the implementation of the HTSUS was intended to be revenue neutral, down comforters should be dutiable at 5 percent *ad valorem* under the HTSUS. Customs disagrees with this

comment because we are bound by the terms of the HTSUS, and it has been recognized that although it was intended that the implementation of HTSUS be revenue neutral, there are instances where this is not the case.

Both those who supported and opposed the petition cited prior Customs rulings. Many of the rulings cited concerned the classification of articles that were different from down comforters. Although rulings were cited concerning the classification of down comforters, these are the rulings and the issue which the petitioner requested we review.

Both those who supported and opposed the petition stated that the terms of Heading 9404, and the subheadings within that heading, indicate whether an article should be classified in Heading 9404 according to the outer shell or the inner filling. Supporters of the petition state that there are subheadings within Heading 9404 in which the article is classified as to the inner filling; opponents of the petition state that there are subheadings within Heading 9404 in which an article is classified as to the outer shell.

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, and, provided such headings or notes do not otherwise require, according to the remaining GRI's taken in order.

There is no disagreement among the commenters that down comforters fall within the scope of Heading 9404, HTSUS, by the application of GRI 1. Once a heading is determined to be applicable, classification must then be made at the appropriate subheading level.

GRI 6 provides that, for legal purposes, classification in the subheadings of a heading is determined in accordance with the terms of the subheadings and any related subheading notes and in accordance with the preceding rules [GRI's]. Only subheadings at the same level are comparable. Thus GRI 6 applies GRI's 1 through 5 in classifying goods at the subheading level. In addition, in application of GRI 6, classification must be effected at the six-digit level before proceeding to the eight-digit level.

The subheadings at the six-digit level within Heading 9404 are the following: subheading 9404.10, which provides for "mattress supports"; subheadings 9404.21 and 9404.29, which provide for "mattresses"; subheading 9404.30, which provides for "sleeping bags"; and subheading 9404.90, which provides for all other goods not included in the preceding subheadings. Accordingly the subheading at the six-digit level which includes down comforters is 9404.90.

After the applicable subheading at the six-digit level has been ascertained, the correct classification can be determined by comparing the eight-digit subheadings. Subheadings 9404.90.10 and 9404.90.20 provide for "pillows, cushions and similar furnishings." Subheading 9404.90.80 provides for goods described in subheading 9404.90 which

are not classifiable in either of the preceding subheadings, and which are "of cotton, not containing any embroidery, lace, braid, edging, trimming, piping exceeding 6.35 mm or applique work." Subheading 9404.90.90 is a basket provision that covers goods described in subheading 9404.90, but which are not provided for in subheadings 9404.90.10 through 9404.90.80.

Down comforters clearly do not fall within the scope of subheadings 9404.90.10 or 9404.90.20. Consequently, the remaining subheadings at the eight-digit level are subheadings 9404.90.80 and 9404.90.90. The comforters which are the subject of the petition meet the terms of subheading 9404.90.80 since the outer shell is made of cotton and does not contain embroidery, lace, etc. However, the comforters also contain an inner filling of down and since the "other" of subheading 9404.90.90 refers to materials other than cotton, not containing any embroidery, lace, etc., the down comforters also meet the terms of subheading 9404.90.90. Since the comforters are described in more than one subheading, GRI 1 does not govern their classification and the other GRI's must be applied, in order, until a single classification can be determined.

All of the commenters who opposed the petition stated that down comforters should be classified in accordance with GRI 3(a). They stated that of the two competing provisions at the subheading level, subheading 9404.90.80, which provides for "Of cotton, not containing" named forms of decorative features, and subheading 9404.90.90, which provides for "Other," the "of cotton" provision is more specific because down is not specifically provided for.

To understand the scope of GRI 3(a), GRI 2(b) must first be considered. That rule provides, in part, that "The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." Down-filled comforters consist of at least two components, textile covering fabrics and down (including feathers). Accordingly, GRI 3 is applicable. The rules set out in GRI 3 are prefaced by the statement, "When, by application of rule 2(b) or for any other reason, goods are, *prima facie,* classifiable under two or more headings, classification shall be" according to the three subparts of GRI 3, taken in order. GRI 3(a) states that the most specific heading will be preferred *unless* two or more headings each refer to part only of the materials in a good.

The material named in subheading 9404.90.80 is "cotton, not containing any embroidery, lace, braid * * *." That entire description refers to a single material. The words "not containing" and subsequent text are just as much a part of the material being described as if the provision read "Of cotton waste" or "Of cotton sheeting".

The word "Other" in subheading 9404.90.90 refers to materials other than the material named in subheading 9404.90.80. That material could be, for example, man-made fibers, wool, down, or cotton containing embroidery, lace, etc. In down filled comforters, "Other" refers to the down component. Accordingly, headings 9404.90.80 and 9404.90.90 each refer

to part only of the materials in those comforters and GRI 3(a) is not applicable.

GRI 3(b) provides that mixtures and composite goods consisting of different materials or made up of different components shall be classified as if they consisted of the material or component which gives them their essential character. Most of these commenters stated that it was the nature of the down and the role it plays in relation to the use of down comforters which show that it is down that provides the essential character. One commenter stated that the characteristics and quality of a down comforter depend on the performance of the down used to fill it. Also, a commenter stated that it is the down that gives a unique combination of warmth and lightness which is sought by consumers. Another reason many commenters gave that the essential character of down comforters is provided by the down filling is the cost of down. Several commenters stated that the bulk of the costs in producing a down comforter is attributed to the cost of the down itself, with one commenter adding that the down filling costs four times that of the outer shell.

All of the commenters that opposed the petition stated that the essential character of down comforters is imparted by the outer shell. One commenter stated that the character of an article as a comforter does not change by virtue of the filling material; any fill could quite easily be substituted in place of any other fill without destroying the essential character of the article. Two commenters stated that the outer shell provides the comforter with its distinctive appearance and shape, protects the user from ticklish feathers, and serves the very important function of holding the down in place; without the cotton outer shell, the article would be incapable of use as a comforter.

DECISION

After careful consideration of the petition and the comments submitted in response to it, we conclude that the petitioner has demonstrated that down filling imparts the essential character to a down comforter. The characteristics and quality of a down comforter are imparted by the down filling. We do not agree with those who stated that the outer shell gives a down comforter its distinctiveness, since many down comforters have a fairly plain and undecorated outer shell. In addition, although a down comforter would be incapable of use without the outer shell, it would also be incapable of use as a comforter without the down filling.

Another reason that the essential character of a down comforter is imparted by the down is the cost of the down. The much higher costs for down comforters are associated with the down filling, not the outer shell. Therefore, consumers are willing to pay a higher price for a down comforter than most other comforters filled with other materials.

In accordance with the above discussion, we conclude that in the application of GRI 3(b), the essential character of down comforters is imparted by the down filling. Consequently, the merchandise at issue is classified under subheading 9404.90.90, HTSUS, which provides for ar-

ticles of bedding and similar furnishings (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered, other, other, other. The applicable rate of duty is 14.5 percent *ad valorem*. Although the subject of this notice and the preceding discussion refer to down comforters, the rationale for classifying that merchandise in subheading 9404.90.90 is equally applicable to down filled quilts, eiderdowns, and similar articles.

This change in classification is effective as to merchandise entered for consumption, or withdrawn from warehouse for consumption, after 30 days after the date of publication in the Customs Bulletin.

Any Customs rulings not in conformity with this notice are hereby revoked.

AUTHORITY

This notice is published in accordance with section 175.22(a), Customs Regulations (19 CFR 175.22(a)).

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: March 2, 1994.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 22, 1994 (59 FR 13452)]

(T.D. 94–26)

TESTING OF PRESSED AND TOUGHENED (SPECIALLY TEMPERED) GLASSWARE

AGENCY: Customs Service, Department of the Treasury.

ACTION: Final notice on the testing of pressed and toughened (specially tempered) glassware.

SUMMARY: Customs has completed a review of the comments submitted by interested parties on the testing of certain articles of glass to ascertain if they have been "pressed and toughened (specially tempered)." These articles are normally imported under Subheading numbers 7013.29.05, 7013.32.10, 7013.39.10, and 7013.99.20 of the Harmonized Tariff Schedule of the United States (HTSUS).

FOR FURTHER INFORMATION CONTACT: Mr. Robert L. Zimmerman, Jr., Office of Laboratories & Scientific Services, (202) 927–1060.

SUPPLEMENTAL INFORMATION:

BACKGROUND

The U.S. Customs Service published the last in a series of requests for comments on a proposed method for the testing of "pressed and tough-

ened (specially tempered)" glassware in the Federal Register (Vol. 58, No. 192, October 6, 1993). Specifically, comments were requested on a part of the proposed method entitled "Cutting Test for Opaque Glassware". These glassware articles are normally imported under Subheading numbers 7013.29.05, 7013.32.10, 7013.39.10, and 7013.99.20 of the Harmonized Tariff Schedule of the United States (HTSUS). Articles of "safety glass, consisting of toughened (tempered) * * * glass" normally imported under Heading 7007 of the HTSUS, e.g., architectural plate glass, vehicle windshields, were not within the purview of the notice.

The U.S. Customs Service received responses from two interested parties as a result of the October 6, 1993, Notice. Both respondents endorsed the incorporation of the cutting test into the overall method.

Issue 1—Fluorosilicate glass.

Respondent A offered a caution on the behavior of fluorosilicate glass articles when subjected to the cutting test. According to their comments, "while soda lime tempered glass and borosilicate tempered glass does indeed break almost immediately upon contact with the saw, fluorosilicate glass will not break until the saw has passed through at least a part of the glass." Customs has studied this point and has found that the respondent's comments are valid. This study has also shown that, while a deeper cut into the glass article is necessary, the article will not sever "cleanly" into two pieces as does annealed glass. Therefore, appropriate changes have been made to the method to address the fluorosilicate issue.

Issue 2—Thermal Shock Conditions.

Respondent B included a comment on thermal shock conditions. These issues have been discussed in previous Federal Register Notices on this subject. Customs has no further comments on this topic at this time.

Conclusion

Effective as of the date of publication of this Notice in the Federal Register, Customs will conduct the analysis of all glassware falling under the purview of the aforementioned HTSUS item numbers, using the following method.

METHOD

SAFETY PRECAUTION: CERTAIN PROCEDURES DESCRIBED IN THIS METHOD POSE A POTENTIAL HAZARD TO PERSONNEL FROM THE PROXIMITY TO OR HANDLING OF BREAKING OR BROKEN GLASS. THIS METHOD SHALL NOT BE UNDERTAKEN WITHOUT SUPERVISORY CONCURRENCE THAT ADEQUATE PRECAUTIONS FOR PERSONAL SAFETY HAVE BEEN IMPLEMENTED.

I. Apparatus

A. *Photographic Equipment:*

A camera (equipped with flash or supplemented by adequate lighting) is recommended for making a permanent record of unusual samples and test results.

B. *Polariscope:*

The basic instrument consists of a light source, a polarizer, and an analyzer. The addition of a full-wave retardation, or tint, plate permits observation of color-enhanced stress patterns. Ideally, the working space, or distance between the polarizer and the analyzer, should be large enough to accommodate samples ranging up to eight inches in height.

C. *Tile Saw (or Similar Table-Mounted Circular Saw):*

A tile saw having a cutting head which can be adjusted horizontally and vertically and which is equipped with an 8 to 12 inch diameter continuous rim diamond blade designed for wet cutting glass is adequate for testing opaque glassware articles.

D. *Other Apparatus and Supplies:*

The method requires various common laboratory articles such as a caliper or similar device for measuring the diameter of the opening and the maximum inside diameter of the sample, an oven and water bath, and other equipment and supplies. Appropriate safety devices and personal protective equipment are also required.

II. Preparation of the Sample

When available a representative number of samples should be analyzed. However, it is recognized that for any of several reasons, e.g., cost of the item, only a limited number of samples may be submitted for analysis. The possibility exists that only one sample may be available for testing.

III. Analysis Procedures

The following procedures may be conducted in whatever order the analyst deems is appropriate for the particular sample being examined. The test protocol should be terminated at the point that a sample fails to meet any of the key criteria, i.e., "pressed", "toughened", "tempered", or "specially".

A. *Macroscopic Analysis—Examine each article of glassware as follows:*

1. Visual Inspection:

Inspect the sample for the following:

- identifying marks, labels, sizes, etc., especially those that may have been caused by a push-up valve and a mold that have been pressed into the article;
- the style (stemware, tumbler, bowl, plate, etc.);
- the presence of ribs, handles, flutes, etc.;
- the size of the rim or opening, if applicable;
- the size of the most bulbous portion of the article;
- any other unusual characteristics (e.g., chips, cracks)

Interpretation of Visual Inspection results: Characteristics such as mold marks, ribs, handles, and flutes are often indicative of a pressed

rather than blown glass article. 2. Dimensional Measurement (applies only to stemware, tumblers, bowls, etc.):

- Using a caliper or similar device, measure the minimum diameter of the mouth, opening, or upper rim of the sample. With the same device, measure the maximum inside diameter. Record both measurements.

Interpretation of Dimensional Measurement results: A sample having a maximum inside diameter greater than the minimum diameter of the mouth, opening, or upper rim is not likely to have been "pressed".

Interpretation of the Macroscopic Analysis Test: The analyst is advised to consider the overall features of the article and the dimensional analysis test results in determining that an article has been "pressed". If the results show that the sample is not "pressed" the testing sequence for this sample should be terminated at this point.

B. *Thermal Shock Test:*

- Heat the sample(s) in an oven to 160°C for 30 minutes.
- Remove 1 sample from the oven and *immediately* immerse it in a water bath set at 25°C. This effects a 135°C difference in temperature. [Note: Reasonable alternate oven and water bath settings up to ± 10°C are acceptable as long as the 135°C difference in temperature is maintained.]

Interpretation of Thermal Shock Test results: Annealed glassware and inadequately or partially tempered glassware will generally not survive this test of durability or toughness. If breakage occurs, the sample is not "toughened" for Customs purposes. Record the findings, and terminate the analysis.

C. *Evaluation of Temper:*

1. Polariscopic Examination:

This method for the qualitative evaluation of temper in glassware should be conducted only on transparent or translucent articles. This method is not applicable to opaque items or to articles which have been tempered by a process other than thermal tempering. In addition, some translucent articles will not transmit enough polarized light to permit the observation of stress patterns; these items should be evaluated for temper using the Cutting Test.

- Place the full-wave retardation plate (tint plate) between the polarizer and the analyzer. The polarized light must pass through both the sample and the retardation plate for the color-enhanced polariscopic pattern to be observed through the analyzer. Position the retardation plate in direct contact with the polarizer or, alternatively, just in front of the analyzer.
- Turn on the light source.
- Evaluate the stress in the bottom of the intact article by placing its bottom surface in contact with the polarizer so that the polarized light passes perpendicularly through the bottom surface, or as close to perpendicularly as possible, depending upon the article's shape. [This positioning does not work well with stemware because of color patterns

caused by the stem itself. With these items, it will be necessary to hold the glass at a slight angle to view the base and the bowl separately.]

• Evaluate the stress in the sides of the intact article, especially near the rim or edge, by positioning the article so that the polarized light passes perpendicularly through the sides near the rim, or as close to perpendicularly as possible, depending upon the article's shape. Observation of the stress patterns in the sidewall and rim areas should be made while viewing through a single thickness of glass. For some items, especially stemware, tumblers, and mugs, this will require holding the article at a slight angle to the polarizer (open end raised slightly).

Interpretation of the Polariscopic Examination: Thermal tempering of glassware involves heating to the softening point followed by rapid cooling. The surfaces cool first and reach a temperature where they become rigid. With further cooling, the interior or core tries to shrink but is prevented from doing so by the rigid surface layers. This results in the surfaces being locked into a state of high compression and the interior locked into compensating tension.

When polarized light rays travel through a stressed material, they divide into slow and fast fronts. As a result of the difference in speed of the slow and fast rays, interferences occur and a pattern of colors is observed. These colors can be used to evaluate the stresses in the article. As the stress increases, the observed color changes to reflect the amount of stress. The color changes follow a rigorous sequence as the stress-induced retardation, or distance between the fast and slow rays, increases. In low-stress areas, black and shades of gray are seen. Evaluation of low stress is simplified by using a color-enhancing retardation or tint plate which adds a shift of one fringe order, or 565 nm, in the color pattern throughout the observed field. With the tint plate in place, even low and moderately stressed areas will exhibit a contrasting color effect.

Annealed glassware will exhibit a uniform coloration of the polarized light passing through it; there will be essentially no change from background. Tempered articles will exhibit non-uniform coloration of the polarized light on the bottom surface and sidewalls and bands of color parallel to the rim or lip. [Note: With highly colored articles, it may be helpful to conduct the polariscopic exam without the tint plate. There will be no color enhancement, but the gray to black interference patterns should be readily discernible in tempered articles.]

If the sample passes the Thermal Shock Test and shows evidence of full-surface tempering (as opposed to rim-tempering or partial tempering) when examined polariscopically, the sample has been "toughened (specially tempered)" for Customs purposes.

2. Cutting Test for Opaque Glassware:

This test is applicable to opaque articles and to those translucent articles which can not be examined polariscopically because of inadequate transmission of the polarized light.

• Ensure that the saw is equipped with a continuous rim diamond blade designed for wet cutting glass.

- Adjust the cutting head of the saw vertically and horizontally, as necessary, to accommodate the glassware article.
- Be sure the water supply to both sides of the diamond-rimmed blade is adequate.
- Turn on the saw.
- While holding or otherwise securing the article to prevent twisting and binding during the cutting, slowly and gently move the article into contact with the blade.
- Proceed with the cutting.

Interpretation of the Cutting Test: Annealed (non-tempered) glassware will readily accept the diamond-rimmed blade and will be cleanly cut in half. Tempered glass, on the other hand, will break into pieces when cut. Tempered soda lime and borosilicate glass will break almost immediately, whereas tempered fluorosilicate glass will not break until the blade has cut through at least part of the article. The extent of cutting needed to induce breakage may vary from item to item, but in no event will tempered articles be cleanly cut in half by the diamond-rimmed blade.

A sample that passes the Thermal Shock Test and shows evidence of tempering per the guidance given above for the Cutting Test has been "toughened (specially tempered)" for Customs purposes.

Dated: March 15, 1994.

GEORGE D. HEAVEY,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, March 22, 1994 (59 FR 13531)]

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 4–1994)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of February 1994 follow. The last notice was published in the CUSTOMS BULLETIN on March 16, 1994.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: March 16, 1994.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9400035	19940202	20140202	CALIFORNIA STARLIGHT COMPANY 1992 DESIGN I	CALIFORNIA STARLIGHT CO.	N
COP9400036	19940210	20140210	SNAKESKIN CAMO	JIMMY JOBE	N
COP9400037	19940216	20140216	BATTENBURG HAND MAKE LACE SWAGS	L. KEE & CO.	N
COP9400038	19940217	20140217	CARNEVALE PINE CONE	CARNEVALE, INC.	N
SUBTOTAL RECORDATION TYPE		4			
TMK9400036	19940202	20021125	CHRISTIAN DIOR	CHRISTIAN DIOR, S.A.	N
TMK9400037	19940202	20030227	CHRISTIAN DIOR	CHRISTIAN DIOR, S.A.	N
TMK9400038	19940202	20030306	DIOR	CHRISTIAN DIOR, S.A.	N
TMK9400039	19940202	20000703	REGAL	REGAL WARE, INC	N
TMK9400040	19940202	20000703	KITCHEN PRO	REGAL WARE, INC	N
TMK9400041	19940202	20000703	KITCHEN PRO	REGAL WARE, INC	N
TMK9400042	19940202	20081011	THE TUXEDO CLUB	MGRR, INC.	Y
TMK9400043	19940210	20000501	AWAPUHI SHAMPOO AND DESIGN	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400044	19940210	20010312	PASSPORT TO EDUCATION	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400045	19940210	20020211	FREEZE AND SHINE SUPER SPRAY	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400046	19940210	20020211	MISCELLANEOUS DESIGN - SHAPE OF THE BOTTLE	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400047	19940210	20030621	PAUL MITCHELL	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400048	19940210	20020331	PAUL MITCHELL	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400049	19940210	20021111	PAUL MITCHELL FOAMING POMMADE	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400050	19940210	20020512	PAUL MITCHELL SHAMPOO ONE	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400051	19940210	20030302	PAUL MITCHELL SOFT SCULPTING SPRAY GEL	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400052	19940210	20021102	PAUL MITCHELL SCULPTING FOAM	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400053	19940210	20020922	PAUL MITCHELL THE RELAXER	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400054	19940210	20020922	THE CONDITIONER AND DESIGN	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400055	19940210	20030330	SHAMPOO TWO	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400056	19940210	20030330	SHAMPOO THREE	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400057	19940210	20030614	SUPER-CHARGED CONDITIONER	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400058	19940210	20030119	DETANGLER AND DESIGN	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400059	19940210	20021103	XO WAVE	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400060	19940210	20010326	SEAL AND SHINE	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400061	19940210	20030223	PAUL MITCHELL HAIR REPAIR TREATMENT	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400062	19940210	20030112	PAUL MITCHELL	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400063	19940210	20020215	PAUL MITCHELL	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400064	19940210	20020901	SUPER CLEAN SCULPTING GEL	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400065	19940210	20020630	TEA TREE SPECIAL SHAMPOO	JOHN PAUL MITCHELL SYSTEMS	N
TMK9400066	19940210	20021013	SUPER CLEAN SPRAY	JOHN PAUL MITCHELL SYSTEMS INC.	N
TMK9400067	19940210	20040111	HADDLERS	LUNA INTERNATIONAL U.S.A., INC.	Y
TMK9400068	19940216	20040911	MOVADO	NORTH AMERICAN WATCH CORP.	N
TMK9400069	19940216	20060624	CIRCLE DESIGN ON FACE OF WATCH	NORTH AMERICAN WATCH CORP.	N
TMK9400070	19940216	20060204	CIRCLE DESIGN WITH SMALLER INTERNAL CIRCLE	NORTH AMERICAN WATCH CORP.	N
TMK9400071	19940216	20000612	CORUM DESIGN	NORTH AMERICAN WATCH CORP.	N
TMK9400072	19940216	20021218	PIAGET	NORTH AMERICAN WATCH CORP.	N
TMK9400073	19940216	19981014	CONCORD	NORTH AMERICAN WATCH CORP.	N
TMK9400074	19940216	19971129	LOVE BRACELET DESIGN	CARTIER INTERNATIONAL	N
TMK9400075	19940216	20050612	CARTIER	CARTIER INTERNATIONAL	N
TMK9400076	19940216	20050612	CARTIER	CARTIER INTERNATIONAL	N
TMK9400077	19940216	20050109	CARTIER	CARTIER INTERNATIONAL	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9400078	19940216	20030709	CARTIER	CARTIER INTERNATIONAL	N
TMK9400079	19940216	20050619	CARTIER	CARTIER INTERNATIONAL	N
TMK9400080	19940216	20050619	CARTIER	CARTIER INTERNATIONAL	N
TMK9400081	19940216	20050109	CARTIER	CARTIER INTERNATIONAL	N
TMK9400082	19940216	20050109	CARTIER	CARTIER INTERNATIONAL	N
TMK9400083	19940216	20041212	CARTIER	CARTIER INTERNATIONAL	N
TMK9400084	19940216	20031029	CARTIER	CARTIER INTERNATIONAL	N
TMK9400085	19940216	20050213	CARTIER	CARTIER INTERNATIONAL	N
TMK9400086	19940216	19980718	INTERLOCKING C DESIGN	CARTIER INTERNATIONAL	N
TMK9400087	19940216	20031022	CARTIER	CARTIER INTERNATIONAL	N
TMK9400088	19940216	20031029	CARTIER	CARTIER INTERNATIONAL	N
TMK9400089	19940216	20031029	CARTIER	CARTIER INTERNATIONAL	N
TMK9400090	19940216	20050612	CARTIER	CARTIER INTERNATIONAL	N
TMK9400091	19940216	19970215	CARTIER	CARTIER INTERNATIONAL	N
TMK9400092	19940216	20050515	CARTIER	CARTIER INTERNATIONAL	N
TMK9400093	19940216	20020803	MUST	CARTIER INTERNATIONAL	N
TMK9400094	19940217	20030308	MUST	CARTIER INTERNATIONAL	N
TMK9400095	19940217	19970906	INTERLOCKING C DESIGN	CARTIER INTERNATIONAL	N
TMK9400096	19940217	20020810	MUST	CARTIER INTERNATIONAL	N
TMK9400097	19940217	20030410	MUST	CARTIER INTERNATIONAL	N
TMK9400098	19940217	20020427	MUST	CARTIER INTERNATIONAL	N
TMK9400099	19940217	20030329	MUST	CARTIER INTERNATIONAL	N
TMK9400100	19940217	20030315	MUST	CARTIER INTERNATIONAL	N
TMK9400101	19940217	20040515	MUST DE CARTIER BOTTLE DESIGN	CARTIER INTERNATIONAL	N
TMK9400102	19940217	20030927	MUST DE CARTIER	CARTIER INTERNATIONAL	N
TMK9400103	19940217	20030823	SANTOS	CARTIER INTERNATIONAL	N
TMK9400104	19940217	20020927	SANTOS	CARTIER INTERNATIONAL	N
TMK9400105	19940217	19990306	INTERLOCKING C DESIGN	CARTIER INTERNATIONAL	N
TMK9400106	19940217	19990109	INTERLOCKING C DESIGN	CARTIER INTERNATIONAL	N
TMK9400107	19940217	19950311	TANK	CARTIER INTERNATIONAL	N
TMK9400108	19940217	19950225	LOVE BRACELET	CARTIER INTERNATIONAL	N
TMK9400109	19940217	19981219	METALLIC CORNER DESIGN	CARTIER INTERNATIONAL	N
TMK9400110	19940217	19950311	ROLLING RING DESIGN	CARTIER INTERNATIONAL	N
TMK9400111	19940217	20030421	CHRISTIAN DIOR	LVMH MOET HENNESSY LOUIS VUITTON	N
TMK9400112	19940217	20030831	SHELTER ISLAND	SHELTER ISLAND, INC.	Y
TMK9400113	19940217	20020122	A & ANCHOR DESIGN	GENNARO AURICCHIO S.P.A.	N
TMK9400114	19940217	20030714	AURICCHIO	GENNARO AURICCHIO S.P.A.	N
TMK9400115	19940217	20020912	INDIANAPOLIS COLTS HELMET DESIGN	INDIANAPOLIS COLTS, INC.	Y
TMK9400116	19940217	20030529	CHICAGO BEARS HELMET DESIGN	INDIANAPOLIS COLTS, INC.	Y
TMK9400117	19940223	20030615	ESCAPE	CALVIN KLEIN COSMETIC CORP.	N
TMK9400118	19940223	20021215	ESCAPE	CALVIN KLEIN COSMETIC CORP.	N

SUBTOTAL RECORDATION TYPE 83

TOTAL RECORDATIONS ADDED THIS MONTH 87

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., March 15, 1994.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, has been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF BACKPACK BLOWERS

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a backpack blower and its eligibility for duty-free treatment under heading 9817.00.50, HTSUS. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before April 29, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Robert Altneu, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Cus-

toms intends to modify a ruling pertaining to the tariff classification of a backpack blower, and its eligibility of duty-free treatment under heading 9817.00.50, HTSUS, as a machinery, equipment, and implements to be used for agricultural or horticultural purposes.

In New York Ruling Letter 887425, issued on July 14, 1993, by the Area Director of Customs, New York Seaport, a backpack blower was classified under subheading 8414.59.80, HTSUS [1993], which provides for other centrifugal blowers, eligible for duty-free treatment under heading 9817.00.50, HTSUS, as machinery, equipment and implements to be used for agricultural or horticultural purposes (see ruling letter at "Attachment A" to this document).

Customs Headquarters is of the opinion that the New York ruling letter (887425) erroneously classified the backpack blower as eligible for duty-free treatment under heading 9817.00.50, HTSUS, which provides for: machinery, equipment, and implements to be used for agricultural or horticultural purposes. In fact, the backpack blower does not meet the three part test to qualify for this provision. The product is designed to sweep debris, grass, straw, leaves, small twigs or light snow. It can also be used for fast drying wet outdoor areas such as a patio, sidewalk, carport, etc. It is our opinion that these uses do not meet the agricultural or horticultural purposes requirement, and therefore, the backpack blower should be classified in subheading 8414.59.60, HTSUS [1994]. *See* HQs 086883, 087076, and 089936.

Customs intends to modify NY 887425 to reflect the proper classification of the product in subheading 8414.59.60, HTSUS [1994], which provides for: "[a]ir or vacuum pumps, air or other gas compressors and fans * * *: [f]ans: [o]ther: [o]ther: [o]ther * * *." This modification of NY 887425 will also indicate that the backpack blower is ineligible for duty-free treatment under heading 9817.00.50, HTSUS.

Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters ruling 955369 modifying NY 887425 is set forth in Attachment 8 to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 11, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, N.Y., July 14, 1993.

CLA–2–84:S:N:N3:102 887425
Category: Classification
Tariff No. 8414.59.8060 and 9817.00.5000

MS. SILVIA PEREZ
M.G. MAHER & CO., INC.
One Canal Place, Suite 2100
New Orleans, LA 70130

Re: The tariff classification of a backpack blower from Japan.

DEAR MS. PEREZ:

In your letter dated June 14, 1993, on behalf of your client, the Poulan/Weed Eater Division of WCI, you requested a tariff classification ruling.

The article at issue here is the model 442 "Poulan Pro" gasoline powered backpack blower. The unit is comprised of a 2-cycle, air-cooled engine driving a centrifugal blower. There is a flexible tube air outlet as well as a multi-tube, hand-held nozzle. The unit is designed to be carried on the user's back by means of shoulder straps and backpad.

According to the literature submitted with your request, the primary usage of this blower is to "sweep debris, grass, straw, leaves, small twigs or light snow * * * fast drying wet outdoor areas such as patio, sidewalk, carport, etc.

The applicable subheading for the Poulan Pro, model 442, will be 8414.59.8060, Harmonized Tariff Schedule of the United States (HTS), which provides for other centrifugal blowers. The rate of duty will be 4.7 percent ad valorem. HTS subheading 9817.00.5000, which is free of duty, is the provision covering machinery, equipment and implements to be used for agricultural or horticultural purposes. Subject to actual use certification, in keeping with sections 10.131–10.134 of the Customs Regulations, the items classified above would, in the alternative, be classified in subheading 9817.00.5000.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN P. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.,

CLA–2 CO:R:C:M 955369 RFA
Category: Classification
Tariff No. 8414.59.60

MS. SILVIA PEREZ
H.G. MAHER & CO., INC.
One Canal Place, Suite 2100
New Orleans, LA 70130

Re: Backpack blower; fans; 9817.00.50; agricultural or horticultural purposes; EN 84.14; HQs 083930, 086883, and 087076: NY 887425, modified.

DEAR MS. PEREZ:

This is in reference to NY 887425, dated July 14, 1993, issued to you on behalf of Poulan/Weed Eater Division of WCI, by the Area Director of Customs in New York. In NY 887425,

you received the tariff classification of the model 442 "Poulan Pro" gasoline powered backpack blower under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The model 442 "Poulan Pro" gasoline powered backpack blower is comprised of a 2-cycle, air-cooled engine which drives a centrifugal blower. It has a flexible tube air outlet as well as a multi-tube, hand-held nozzle. The merchandise is designed to be carried on the user's back by means of shoulder straps and backpad. According to the literature, the merchandise is designed to sweep debris, grass, straw, leaves, small twigs or light snow. It can also be used for fast drying wet outdoor areas such as a patio, sidewalk, carport, etc.

In NY 887425, dated July 14, 1993, the Area Director of Customs in New York, classified the merchandise under subheading 8414.59.80, HTSUS [1993], which provides for: "[a]ir or vacuum pumps, air or other gas compressors and fans * * *: [f]ans: [o]ther: [o]ther * * *." The ruling further stated that the subject merchandise may be eligible for duty-free treatment under heading 9817.00.50, HTSUS, which provides for machinery, equipment, and implements to be used for agricultural or horticultural purposes.

Issue:

What is the classification of the backpack blower and does it qualify for duty-free entry as agricultural or horticultural implements, in Chapter 98, under the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

Heading 9817.00.50, HTSUS, grants duty-free treatment for "[m]achinery, equipment and implements to be used for agricultural or horticultural purposes * * *". This is an actual use provision. *See* HQ 083930 (May 19, 1989). To fall within this special classification, a three part test must be met. First, the subject merchandise must not be excluded from the heading under Section XXII, Chapter 98, Subchapter XVII, U.S. Note 2, HTSUS. Secondly, the terms of the headings must be met in accordance with GRI 1, which provides that classification is determined according to the terms of the headings and any relative section or chapter notes. Thirdly, the article must comply with the actual use regulations under section 10.131 through 10.139, Customs Regulations (19 CFR 10.131 through 10.139). *See* HQ 086883 (May 1, 1990); HQ 087076 (June 14, 1990); HQ 089936 (November 15, 1991).

The first part of the test is to determine whether the backpack blower is excluded from heading 9817.00.50, HTSUS. To do this we must first determine under which subheading it is classified. The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the Customs Cooperation Council's official interpretation of the HTSUS. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* 54 Fed.Reg. 35127, 35128 (August 23, 1989). EN 84.14, page 1163, defines "fans" as follows:

> These machines, which may or may not be fitted with integral motors, are designed either for delivering large volumes of air or other gases at relatively low pressure or merely for creating a movement of the surrounding air.
>
> Those of the first kind may act as air extractors or as blowers. They consist of a propeller or blade-type impeller revolving in a casing or conduit, and function on the principle of rotary or centrifugal compressors.

The subject merchandise meets the definition of "fans" under EN 84.14 because it is fitted with an integral motor and is designed to act as a centrifugal blower. It is therefore classifiable under subheading 8414.59.60, HTSUS [1994], which provides for: "[a]ir or vacuum pumps, air or other gas compressors and fans * * *: [f]ans: [o]ther: [o]ther: [o]ther * * *." This subheading is not excluded from classification in heading 9817.00.50, HTSUS, by operation of Section XXII, Chapter 98, Subchapter XVII, U.S. Note 2.

The second part of the test calls for the merchandise to be included within the terms of heading 9817.00.50, HTSUS, as required by GRI 1. The backpack blower must be "machinery", "equipment" or "implements" used for "agricultural or horticultural pur-

poses". Webster's II New Riverside University Dictionary (1988), defines machinery, equipment, implements, agriculture and horticulture as follows:

Machinery:	1. Machines or machine parts in general. 2. The working parts of a machine. 3. A system of related elements that operates in a definable way.
Equipment:	1. The act of equipping or state of being equipped. 2. Something with which one is equipped.
Implement:	1. A tool, utensil, or instrument for doing a task. 2. An article used to outfit or equip.
Agriculture:	The science, art, and business of cultivating the soil, producing crops, and raising livestock.
Horticulture:	The science, art, and business of cultivating fruits, vegetables, flowers, and plants.

There is no question that the backpack blower is "machinery". The next determination to be made is what agricultural or horticultural pursuit is in question. According to the literature, the backpack blowers have a variety of utilitarian purposes, none directly related to agricultural or horticultural purposes. The primary purpose of the merchandise is to "sweep debris, grass, straw, leaves, small twigs or light snow" and for "fast drying wet outdoor areas such as a patio, sidewalk, carport, etc." Based upon this description of uses, we find that the merchandise, while meeting the definition of "machinery", does not meet the definitions for agricultural or horticultural purposes. The merchandise does not meet the second part of the test for classifying an item in heading 9817.00.50, HTSUS. Therefore, we find that the backpack blower does not qualify for duty-free entry as agricultural or horticultural machinery, in Chapter 98, under the HTSUS. NY 887425 must be modified accordingly.

Holding:

The submitted merchandise is classifiable under subheading 8414.59.60, HTSUS [1994], which provides for: "[a]ir or vacuum pumps, air or other gas compressors and fans * * *: [f]ans: [o]ther: [o]ther: [o]ther * * *." The column 1, general rate of duty is 4.7 percent ad valorem.

Effect on other rulings:

NY 887425, dated July 14, 1993, no longer reflects the position of Customs Service and is modified pursuant to section 177.9(d) of the Customs Regulations [19 CFR 177.9(d)].

JOHN DURANT,
Director,
Commercial Rulings Division.

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19 CFR Part 177

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF LASER BEAM PRINTER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling letter concerning the tariff classification of a laser beam printer. Notice of the proposed revocation was published February 9, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 6.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after May 31, 1994.

FOR FURTHER INFORMATION CONTACT: Kathleen Clarke, Metals and Machinery Classification Branch, Office of Regulations and Rulings (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 9, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 6, proposing to revoke New York Ruling Letter (NY) 869784, issued December 24, 1991, by the Area Director of Customs, New York Seaport, which classified Copal Laser Beam Printer Models SLB 6000 and SLB 6009 under subheading 8442.40.00, Harmonized Tariff Schedule of the United States (HTSUS), as parts of other machinery, apparatus and equipment for type-founding or typesetting. Only one comment was received in response to this notice and that comment supported Customs position in revoking NY 869784. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), this notice advises interested parties that Customs is revoking NY 869784 to reflect the proper classification of the products under subheadings 8471.92.54 or 8471.92.56, HTSUS, which provide for other laser printer units, depending upon the pages per minute printing speed. Headquarters Ruling Letter (HRL) 951222 revoking NY 869784, is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 14, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 14, 1994.

CLA–2 CO:R:C:M 951222 KCC
Category: Classification
Tariff No. 8471.92.54 and 8471.92.56

MS. LISA L. CORTES
NIPPON EXPRESS USA INC.
20444 S. Reeves Avenue
Long Beach, California 90810

Re: NY 869784 revoked; Copal Laser Beam Printer Models SLB 6000 and SLB 6009; 8442.40.00; NY 862408; Note 5, Chapter 84; principal use; Additional U.S. Rule of Interpretation 1(a).

DEAR MS. CORTES:

This is in reference to New York Ruling (NY) 869784 issued to you on December 24, 1991, on behalf of Marubeni International Electronics, which concerned the tariff classification of Copal Laser Beam Printers under the Harmonized Tariff Schedule of the United States (HTSUS). Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NY 869784 was published February 9, 1994, in CUSTOMS BULLETIN, Volume 28, Number 6.

Facts:

The Copal Laser Beam Printer Models SLB 6000 and SLB 6009 ("printers") at issue in NY 869784 were described as being "* * * used in electronic publishing as the output printers of newspaper front-end systems that prepare print copy so that printing plates can subsequently be produced therefrom." The printers copy onto plain paper by using semi-conductor lasers with electrophotography. The printers were imported without control units.

In NY 869784, the Area Director, New York Seaport, held that the printers were classified under subheading 8442.40.00, HTSUS, which provides for parts of other machinery, apparatus and equipment for type-founding or typesetting. This classification was based on the premise that the printers at issue had resolutions of 600 dots per inch ("dpi"). NY 869784 stated that 600 dpi was double that of standard output printers. Based on the printers resolution, NY 869784 stated "* * * that the principal function of laser beam printers of this resolution is in preparing typeset copy for printing."

NY 869784 did not take into consideration NY 862408 dated April 19, 1991, in which nine laser beam printers with 600 dpi resolution were classified under subheading 8471.92.70, HTSUS, as other printers. As of January 1, 1994, subheading 8471.92.70, HTSUS, has been superseded by subheadings 8471.92.54 and 8471.92.56, HTSUS. The printers in NY 862408 were similar to the printers in NY 869784 in that they both lacked control units. Both types of printers in NY 869784 and NY 862408 are commonly known in the trade as "engines" or "imagesetters."

The competing subheadings are:

8442.40.00	Machinery, apparatus and equipment (other than the machine tools of headings 8456 to 8465), for type-founding or typesetting, for preparing or making printing blocks, plates, cylinders or other printing components; blocks, plates, cylinders and lithographic stones, prepared for printing purposes (for example, planed, grained or polished); parts thereof* * * Parts of the foregoing machinery, apparatus or equipment.
8471.92.54	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included * * * Other * * * Input or output units, whether or not entered with the rest of a system and whether or not containing storage units in the same housing * * * Other * * *

Printer Units * * * Other * * * Laser * * * Capable of producing more than 20 pages per minute.

8471.92.56 Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included * * * Other * * * Input or output units, whether or not entered with the rest of a system and whether or not containing storage units in the same housing * * * Other * * * Printer Units * * * Other * * * Laser * * * Other.

Issue:

Are the Copal Laser Beam Printers classified as parts of other machinery, apparatus and equipment for type-founding or typesetting under subheading 8442.40.00, HTSUS, or as other laser printer units under subheadings 8471.92 54 or 8471.92.56, HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

Note 5, Chapter 84, HTSUS, states that:

> Heading 8471 does not cover machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function. Such machines are classified in the headings appropriate to their respective functions or, failing that, in residual headings.

Headings 8442 and 8471, HTSUS, are considered use provisions. "A tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong,and the controlling use is the principal use." Additional U.S. Rule of Interpretation 1(a), HTSUS.

We need to determine the principal use of the class or kind of printers under consideration. Additionally, we need to determine where Customs draws the line between the printers of heading 8471, HTSUS, and those of heading 8442, HTSUS?

We have carefully researched and reviewed information about the printers under consideration, as well as the laser printer industry as a whole. After consideration of all the relevant facts, we are of the opinion that printers with resolutions of 900 dpi or less are classifiable under heading 8471, HTSUS, unless, the importer can prove that, in its condition as entered, the printer can perform a specific function. If it is established that the printers do perform a specific function, than pursuant to Note 5, Chapter 84, HTSUS, they are classified in the heading appropriate to their respective function.

We are aware that in the laser printer industry the resolutions or dpi of laser printers are always advancing. Therefore, in the future Customs may have to adjust its 900 dpi figure in order to reflect technological advances. Additionally, it should be noted that Customs has chosen the 900 dpi figure as a reference point for classification of this class or kind of printer. Customs will not merely look to the dpi of laser printers, but will examine all aspects of the imported merchandise. Customs will look at items such as application specific controllers, software dedicating the printers for use with a specific function, pages per minute printing speed or other special features. It is ultimately the importer's responsibility to present Customs with the necessary evidence to classify their printers pursuant to a specific function.

Therefore, based on the information submitted and NY 862408, the printers under consideration are classified under heading 8471, HTSUS. Inasmuch as the printers are imported without their control unites, they are specifically classified under subheading 8471.92.54 or 8471.92.56, HTSUS, as other laser printer units, depending upon the pages per minute printing speed.

Holding:

The Copal Laser Beam Printer Models SLB 6000 and SLB 6009 are classified under subheading 8471.92.54 or 8471.92.56, HTSUS, as other laser printer units, depending upon the pages per minute printing speed. Both tariff provisions are currently subject to the Column 1 General free rate of duty.

NY 869784 dated December 24, 1991, is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF THE OCTOSTOP II PEDIATRIC IMMOBILIZATION SYSTEM

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of the Octostop II Pediatric Immobilization System. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before April 29, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of the Octostop II Pediatric Immobilization System. In NY 860228, issued on February 19, 1991, the system was held to be classifiable under subheading 9018.90.80, HTSUS, which provides for parts and accesso-

ries of instruments and appliances used in medical, surgical, dental or veterinary sciences. The ruling letter is set forth in Attachment A to this document.

Customs Headquarters is of the opinion that the Pediatric Immobilization System is classifiable under subheading 9022.90.60, HTSUS, which provides for other parts and accessories of apparatus based on the use of X-rays.

Because the Pediatric Immobilization System is not a "good included" in any heading of chapter 84, 85, 90 or 91, HTSUS, it is therefore necessary to resort to note 2(b) to chapter 90. According to note 2(b), the system, which is a specially designed accessory that is solely or principally used with X-ray apparatus, is classifiable under subheading 9022.90.60, HTSUS.

The Pediatric Immobilization System's specially designed features include: wood that is selected without knots so that it does not cast any shadow on X-ray films; octagonal loops that are selected to give exact 45 degree angles of views requested for optimal X-ray films; the groove and support are designed to provide a centered rotation, so the baby patient does not move outside the X-ray beam during examinations. Moreover, the product is not sold as a general immobilization device, as demonstrated by the total absence of such reference in the most recent product brochure.

Customs intends to revoke NY 860228 to reflect the proper classification of the product in subheading 9022.90.60, HTSUS. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters ruling 955025, revoking NY 860228, is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 14, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, N.Y., February 19, 1991.

CLA–2–90:S:N:N1:119 860228
Category: Classification
Tariff No. 9018.90.8000

MS. ANN M. WILLIAMS
A.N. DERINGER, INC.
30 West Service Road
Champlain, NY 12919–9703

Re: The tariff classification of a pediatric immobilization system from Canada.

DEAR MS. WILLIAMS:

In your letter dated January 31, 1991, on behalf of Octostop Enterprises Inc., Quebec, Canada, you requested a tariff classification ruling.

Based on the information you have furnished the articles to be imported are a wood board with a covering of foam and plastic and two octagonal plastic end units which contain lead counterweights. These parts appear to be the main components of a pediatric immobilization system used to maintain a child in a fixed position during certain medical procedures. The system can be used not only for X-ray but for magnetic resonance imaging or other medical procedures that require that the child remain immobile.

The applicable subheading for the pediatric immobilization system will be 9018.90.8000, Harmonized Tariff Schedule of the United States (HTS), which provides for instruments and appliances used in medical, surgical dental or veterinary sciences * * * parts and accessories thereof: other: other. The duty rate will be 7.9 percent.

Goods classifiable under subheading 9018.90.8000, HTS, which have originated in the territory of Canada, will be entitled to a 5.5% rate of duty under the United States-Canada Free Trade Agreement (FTA) upon compliance with all applicable regulations.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.,

CLA–2 CO:R:C:M 955025 LTO
Category: Classification
Tariff No. 9022.90.60

MR. RANDY WILLETTE
A.N. DERINGER, INC.
30 West Service Road
Champlain, New York 12919–9703

Re: Pediatric Immobilization System (Octostop II); NY 860228 *revoked;* Chapter 90, note 2; HQ 087704; *THK America, Inc. v. U.S.; Marubeni America Corp. v. U.S.*

DEAR MR. WILLETTE:

This is in response to your letter of September 13, 1993, on behalf of Octostop Enterprises, Inc., requesting reconsideration of NY 860228, dated February 19, 1991, which

concerned the classification of the Octostop II Pediatric Immobilization System under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The article in question is a Pediatric Immobilization System, which is used to maintain a child in a fixed position. You state that while the device had been marketed for other uses, it is currently used exclusively with X-ray apparatus.

In NY 860228, the system was held to be classifiable under subheading 9018.90.80, HTSUS, which provides for parts and accessories of instruments and appliances used in medical, surgical, dental or veterinary sciences. You contend that the system is classifiable under subheading 9022.90.60, HTSUS, which provides for other parts and accessories of apparatus based on the use of X-rays.

Issue:

Whether the Pediatric Immobilization System is classifiable as other parts and accessories of apparatus based on the use of X-rays under subheading 9022.90.60, HTSUS.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

The headings at issue are as follows:

9018	Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof
*	* * * * * *
9022	Apparatus based on the use of X-rays or of alpha, beta or gamma radiations, whether or not for medical, surgical, dental or veterinary uses, including radiography or radiotherapy apparatus, X-ray tubes and other X-ray generators, high tension generators, control panels and desks, screens, examination or treatment tables, chairs and the like; parts and accessories thereof

With regard to the classification of parts and accessories for machines, apparatus instruments or articles of chapter 90, note 2 to chapter 90 provides as follows:

> (a) Parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85 or 91 * * * are in all cases to be classified in their respective headings;
>
> (b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading * * * are to be classified with the machines, instruments or apparatus of that kind;
>
> (c) All other parts and accessories are to be classified in heading 9033.

Because the Pediatric Immobilization System is not a "good included" in any heading of chapter 84, 85, 90 or 91, it is necessary to resort to note 2(b). You contend that the system is a specially designed accessory that is solely or principally used with the apparatus of heading 9022, HTSUS.

The Pediatric Immobilization System is not necessary to enable the X-ray apparatus with which it is used to fulfill its intended function. However, by keeping the child immobile, the system does contribute to the effectiveness of that apparatus. The system is therefore classifiable as an "accessory" under chapter 90. *See* HQ 087704, dated September 27, 1990.

In a letter dated September 7, 1993, the President of Octostop described the system's components which are specially designed for use with X-ray apparatus, as follows:

> The wood is selected without knots so that it does not cast any shadow on X-ray films * * *; it is light so as to reduce radiation to babies (as such, it complies with FDA requirements of X-ray maximum absorption, and an X-ray compliance label is affixed to the board); the octagonal form of the loops is selected in order to give exact 45 degree angles of views requested for optimal X-ray films; the grove [sic] and support are de-

signed to provide a centered rotation, so the baby patient does not move outside the X-ray beam during examinations. No such design is ever needed in the general medical field.

Moreover, you contend that the product was not sold, nor will it be sold in the future, as a general immobilization device, as demonstrated by the total absence of such reference in the most recent product brochure (1993). Recently, the Court of International Trade stated that "[w]hile an importer's catalogs and advertisements are not dispositive in determining the correct classification of goods under the HTSUS, they are certainly probative of the way the importer viewed the merchandise and of the market the importer was trying to reach." *THK America, Inc. v. U.S.*, Slip Op. 93–207; *Marubeni America Corp. v. U.S.*, 821 F.Supp. 1521, 1528 (1993).

While the system can arguably be used for any medical procedure that requires the child to remain immobile, based on your representations concerning its use, and in light of the current marketing literature, it is our opinion that it is principally used with the apparatus of subheading 9022.90.60, HTSUS.

Holding:

The Octostop II Pediatric Immobilization System is classifiable under subheading 9022.90.60, HTSUS, which provides for parts and accessories of apparatus based on the use of X-rays. The corresponding rate of duty for articles of this subheading is 2.1% *ad valorem*.

Effect on other rulings:

NY 860228, dated February 19, 1991, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

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19 CFR Part 177

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO PARTIAL DUTY EXEMPTION FOR METAL WIRE CLOTH

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of modification of ruling letter concerning the eligibility of metal wire cloth from the United Kingdom for partial duty exemption under subheading 9802.00.60, Harmonized Tariff Schedule of the United States (HTSUS).

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying a ruling letter concerning the eligibility of metal wire from the United Kingdom for a partial duty exemption under subheading 9802.00.60, HTSUS, when returned to the U.S. Notice of the proposed modification was published February 9, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 6.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after May 31, 1994.

FOR FURTHER INFORMATION CONTACT: Wende Schuster, Office of Regulations and Rulings, Special Classification Branch, 202–482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 9, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 6, proposing to modify New York Ruling Letter (NYRL) 888508, issued July 26, 1993, by the Area Director of Customs, New York Seaport, concerning the eligibility of wire cloth made of platinum and rhodium alloy for a partial duty exemption under subheading 9802.00.60, HTSUS. No comments were received. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), this notice advises interested parties that Customs is modifying NYRL 888508 to reflect the fact that the subject metal wire, which consists of precious metal is precluded from eligibility for the partial duty exemption available under subheading 9802.00.60, HTSUS. The ruling modifying NYRL 888508 is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 14, 1994.

SANDRA L. GETHERS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 14, 1991.

CLA–2 CO:R:C:S 557525 WAS
Category: Classification
Tariff No. 9802.00.50, 9802.00.60, and 9802.00.80

MR. RUDY MAGDANGAL
ENGELHARD CORPORATION
700 Blair Road
Carteret, N.J. 07008

Re: Reconsideration of NYRL 888508; eligibility of metal wire cloth from the United Kingdom for a partial duty exemption.

DEAR MR. MAGDANGAL:

This is in response to your letter dated August 3, 1993, requesting clarification of New York Ruling Letter (NYRL) 888508 dated July 26, 1993, concerning the eligibility of wire

cloth made of a platinum and rhodium alloy for a partial duty exemption under subheading 9802.00.60, Harmonized Tariff Schedule of the United States (HTSUS). Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 888508 was published February 9, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 6.

Facts:

The subject article is wire cloth made of platinum and rhodium alloy wire produced in the U.S. which is sent to the United Kingdom for a weaving operation. Upon return, to the U.S., the wire cloth will be cut, welded, and made into an activated catalyst which will be treated with a platinum-containing salt and made into multi-layer units.

In NYRL 888508, Customs held that the applicable tariff classification of the wire cloth was under subheading 7115.90.50, HTSUS, and eligible for the partial duty exemption under subheading 9802.00.60, HTSUS. However, you have since been advised by Customs in New York that subheading 9802.00.60, HTSUS, is inapplicable to articles of precious metal. You ask if the returned cloth would be entitled to a partial duty exemption under either subheading 9802.00.50 or 9802.00.80, HTSUS.

Issue:

Whether the wire cloth described above qualifies for the partial duty exemption available under subheading 9802.00.50, 9802.00.60, or 9802.00.80, HTSUS, when returned to the U.S.

Law and Analysis:

Subheading 9802.00.50, HTSUS, provides a partial duty exemption for articles returned to the U.S. after having been exported to be advanced in value or improved in condition by means of repairs or alterations. Such articles are dutiable only upon the value of the foreign repairs or alterations, provided the documentary requirements of section 10.8, Customs Regulations (19 CFR 10.8), are satisfied. However, entitlement to this tariff treatment is precluded in circumstances where the operations performed abroad destroy the identity of the articles or create new or commercially different articles. *See A.F. Burstrom v. United States*, 44 CCPA 27, C.A.D. 631 (1956); *Guardian Industries Corp. v. United States*, 3 CIT 9 (1982). Tariff treatment under subheading 9802.00.50, HTSUS, is also precluded where the exported articles are incomplete for their intended use prior to the foreign processing. *Guardian; Dolliff & Company, Inc. v. United States*, 81 Cust. Ct. 1, C.D. 82, 599 F.2d 1015, 119 (1979).

In applying the above criteria to this case, we conclude that the exported component—wire—is not a "completed article" since it is clearly unsuitable for, and, in fact, incapable of its intended use in the United States as various types of multilayer units. In fact, upon return to the U.S., the wire cloth will be cut, welded, and made into an activated catalyst. Accordingly, the wire cloth is not eligible for the partial duty exemption under subheading 9802.00.50, HTSUS, when returned to the U.S.

Regarding subheading 9802.00.60, HTSUS, this tariff provision provides a partial duty exemption for:

> [a]ny article of metal (as defined in U.S. note 3(d) of this subchapter) manufactured in the United States or subjected to a process of manufacture in the United States, if exported for further processing, and if the exported article as processed outside the United States, or the article which results from the processing outside the United States, is returned to the United States for further processing.

This tariff provision imposes a dual "further processing" requirement on eligible U.S. articles of metal; one foreign, and when returned, one domestic. Metal articles satisfying these statutory requirements may be classified under this tariff provision with duty only on the value of such processing performed outside the U.S., provided the documentary requirements of section 10.9, customs Regulations (19 CFR 10.9), are met.

Pursuant to U.S. note 3(d) of subchapter II, Chapter 98, the term "metal" covers:

> (1) the base metals enumerated in additional U.S. note 1 to section XV; (2) arsenic, barium boron, calcium, mercury, selenium, silicon, strontium, tellurium, thorium, uranium and the rare-earth elements; and (3) alloys of any of the foregoing.

Based on the foregoing definition of metals, it is clear that precious metal or metal clad with precious metals was not intended to be included in this subheading. Therefore, the

metal wire cloth in this case which is classified under a provision (subheading 7115.90.50, HTSUS) which provides for "other articles of precious metal or of metal clad with precious" is not eligible for the partial duty exemption under subheading 9802.00.60, HTSUS.

Finally, we will address the applicability of subheading 9802.00.80, HTSUS. Subheading 9802.00.80, HTSUS, provides a partial duty exemption for:

> [a]rticles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

All three requirements of subheading 9802.00.80, HTSUS, must be satisfied before a component may receive a duty allowance. An article entered under subheading 9802.00.80, HTSUS, is subject to duty upon the full value of the imported assembled article less the cost or value of the U.S. components, upon compliance with the documentary requirements of section 10.24, Customs Regulations (19 CFR 10.24).

Section 10.16(a), Customs Regulations (19 CFR 10.16(a)) provides, in part, that:

> The assembly operations performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners, and may be preceded, accompanied, or followed by operations incidental to the assembly as illustrated in paragraph (b) of this section.

Pursuant to section 10.16(a), Customs Regulations (19 CFR 10.16(a)), Example three provides that:

> The manufacture abroad of cloth on a loom using thread or yarn exported from the United States on spools, cops, or pirns is not considered an assembly but a weaving operation, and the thread or yarn does not qualify for the exemption.

Consistent with the above-cited example in the regulations, we are of the opinion that the process of weaving U.S.-origin metal wire into cloth in the United Kingdom is not considered a proper assembly operation under subheading 9802.00.80, HTSUS. Therefore, the U.S.-origin metal wire which is used in the production of metal cloth in the United Kingdom does not qualify for the partial duty exemption under subheading 9802.00.80, HTSUS.

Holding:

Based on our review of the facts involved in NYRL 888508, we are of the opinion that as the metal wire exported to the United Kingdom consists of precious metal, it is precluded from eligibility for the partial duty exemption available under subheading 9802.00.60, HTSUS. In addition, the wire cloth is not eligible for the partial duty exemption available under subheading 9802.00.50, HTSUS, when returned to the U.S., since the article is not exported in condition complete for its intended purpose. Finally, the operation of weaving U.S.-origin metal wire into cloth in the United Kingdom is not considered a proper assembly operation, and therefore, no allowance in duty may be made for the cost or value of the U.S.-origin components under subheading 9802.00.80, HTSUS. Therefore, the returned wire cloth will be dutiable on its full value.

NYRL 888508 is modified accordingly.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 623 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

SANDRA L. GETHERS,
(for John Durant, Director,
Commercial Rulings Division.)

IN-BOND NOTICE NO. 3

"NEW" CUSTOMS FORMS 7512 AND 7512E TO BE SUSPENDED

The In-Bond Task Force is conducting a comprehensive review of the entire in-bond program. As part of this review, several problems have been identified with the "new" CF 7512 and CF 7512E, Record of In-Bond Movement (100792 editions). As an interim step, on May 2, 1994, use of the CF 7512 and CF 7512E (100792 editions) will be suspended.

"OLD" CUSTOMS FORM 7512 TO BE USED

Effective May 2, 194, filers who utilize a CF 7512 to initiate in-bond movements will be required to use the "old" CF 7512. Transportation Entry and manifest of Goods Subject to Customs Inspection and Permit (040984 edition).

CUSTOMS FORMS 7512C AND 7512D NO LONGER REQUIRED

Use of the in-bond control card, CF 7512C, is no longer required for in-bond movements. Customs field locations will no longer require a CF 7512C or the CF 7512D, Replacement Card. Customs will suspend printing 7512C cards.

HOW TO OBTAIN IN-BOND CONTROL NUMBERS

Filers should continue to use CF 7512C control cards until the supply is exhausted, then obtain a block of in-bond control numbers through the Printing and Distribution Branch in Customs Headquarters. Filers should FAX their requests for in-bond numbers, stating desired quantity, on company letterhead to (202) 927–1179. Please include a return FAX number or address.

The suspended CF 7512E's contain pre-printed in-bond control numbers. Filers who have a supply of CF 7512E's may use the in-bond control numbers from those unused forms as the in-bond control numbers for initiating in-bond movements on the "old" CF 7512 (040984 edition).

ADDITIONAL INFORMATION REQUIREMENTS ON CF 7512

Instructions for completing the CF 7512 are contained in Customs Directive 3240–36, dated January 7, 1988. With the elimination of the CF 7512C and CF 7512D, the following additional data is required to be annotated by the filer to the CF 7512:

1. In the field marked: "to be shipped in bond via"; in addition to bonded carrier name or carrier code, include the CF 301 bond number or IRS number of the carrier.
2. In the field marked: "consigned to District Director of Customs at"; in addition to the name of the district, include the port code.

PHONE NUMBERS FOR ASSISTANCE

Questions pertaining to the issuance of in-bond control numbers should be directed to the Printing and Distribution Branch, phone:(202) 927–0519, FAX: (202) 927–1179. Other questions regarding this notice should be directed to the Office of Cargo Enforcement and Facilitation, phone: (202) 927–0510, FAX: (202) 927–1356.

AMS and ABI participants will be advised of these changes through administrative message. District offices are asked to post notice of these changes for the non-automated trade participants.

Dated: March 18, 1994.

ANN LOMBARDI,
Director,
Office of Cargo Enforcement and Facilitation.

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 4

PRELIMINARY VESSEL ENTRY AND PERMITS TO LADE AND UNLADE

RIN 1515–AB37

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations regarding the preliminary entry of vessels arriving in ports of the United States and the granting of permits for the lading and unlading of merchandise from those vessels. It is intended that the Customs Regulations regarding this subject accurately reflect recent amendments to the underlying statutory authority, enacted as part of the Customs Modernization Act.

DATE: Comments must be received on or before April 18, 1994.

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Franklin Court, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229, and may be inspected at Franklin Court, 1099 14th Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: James Finnegan, Office of Inspection and Control, 202–927–0510 (operational matters), or Larry L. Burton, 202–482–6940 (legal matters).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, amendments to certain Customs and navigation laws became effective as the result of the President signing Pub. L. 103–182, Title VI of which is popularly known as the Customs Modernization Act (the Act). Sections 653 and 656 of the Act significantly amend the statutes governing the entry and the lading and unlading of vessels in the United States. These operations are governed, respectively, by sections 434 and 448 of the Tariff Act of 1930, as amended (19 U.S.C. 1434 and 1448).

Prior to the subject amendments, the entry of vessels of the United States and vessels of foreign countries had been governed by separate statutes (19 U.S.C. 1434 and 1435), neither of which included elements concerning preliminary vessel entry or the boarding of vessels. The Act repealed section 1435 and amended section 1434 to provide for the entry of American and foreign-documented vessels under the same statute. Additionally, the amended section 1434 now provides authority for the promulgation of regulations regarding preliminary vessel entry, and while neither mandating boarding for all vessels nor specifying that optional boarding must be accomplished at any particular stage of the vessel entry process, the amended law does require that a sufficient number of vessels be boarded to ensure compliance with the laws enforced by the Customs Service.

Section 1448 had previously linked the granting of preliminary vessel entry to a mandatory boarding requirement and the physical presentation of manifest documents to the Customs boarding officer. The amended section 1448 no longer contains provisions regarding preliminary vessel entry, vessel boarding, or manifest presentation, matters which are now provided for in other statutes. Section 1448 now states that Customs may electronically issue permits to lade or unlade merchandise, pursuant to an authorized data interchange system.

The regulations which implement the statutory authority for the granting of preliminary vessel entry and the issuance of permits to lade and unlade merchandise are contained in sections 4.8 and 4.30 of the Customs Regulations (19 CFR 4.8 and 4.30). These provisions still contain mandatory boarding and physical document presentation requirements, and of course do not include any reference to the new electronic permit issuance option. This document proposes to amend sections 4.8 and 4.30 in order to properly implement the amended statutory authority.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments [preferably in triplicate] that are timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs, Franklin Court, Suite 4000, 1099 14th Street, NW, Washington, D.C.

REGULATORY FLEXIBILITY ACT

For the reason stated in the preamble, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are

not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Carrier Rulings Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, Reporting and recordkeeping requirements, Vessels.

PROPOSED AMENDMENTS

It is proposed to amend Part 4, Customs Regulations (19 CFR Part 4), as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4, Customs Regulations (19 CFR Part 4) and the relevant specific authority citation for sections 4.8 and 4.30 (19 CFR 4.8 and 4.30) continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. App. 3;

* * * * * * *

Section 4.8 also issued under 19 U.S.C. 1448, 1486;

* * * * * * *

Section 4.30 also issued under 19 U.S.C. 288, 1433, 1446, 1448, 1450–1454, 1490;

* * * * * * *

2. It is proposed to revise § 4.8, Customs Regulations, to read as follows:

§ 4.8 Preliminary entry.

Preliminary entry allows a U.S. or foreign vessel arriving under circumstances which require it to formally enter, to discharge cargo, passengers, or baggage prior to making formal entry. The granting of preliminary entry may be accomplished electronically pursuant to an authorized electronic data interchange system, or by other means of communication approved by the Customs Service. Preliminary entry must be made in compliance with § 4.30 of this Part. The granting of preliminary vessel entry by the Customs Service may be conditioned upon the presentation of a completed Customs Form 1300 (Master's Certificate on Preliminary Entry) to Customs during discretionary vessel boarding, or upon the filing with Customs of a Customs Form 1300 or its equivalent by electronic or other means in instances where vessels are not boarded.

3. It is proposed to amend § 4.30 (a), Customs Regulations by removing the period at the end of the introductory text and adding the words "or electronically pursuant to an authorized electronic data interchange system or other means of communication approved by the Customs Service."

4. It is proposed to amend § 4.30(b) by adding after the phrase "Customs Form 3171," the words "or electronically pursuant to an authorized electronic data interchange system or other means of communication approved by the Customs Service,".

GEORGE J. WEISE,
Commissioner of Customs.

Approved: February 28, 1994.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 18, 1994 (59 FR 12878)]

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19 CFR Part 101

REALIGNMENT OF TAMPA AND MIAMI DISTRICTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule; solicitation of comments.

SUMMARY: This document proposes to amend the Customs Regulations governing the Customs field organization by changing the boundaries of the Tampa District and the Miami District, which lie in the Southeast Region. The boundaries of these two districts would be altered to reflect the established judicial districts within the state. This would be accomplished by transferring the counties of Collier and Hendry to the Tampa Customs District from the Miami Customs District. The proposed realignment will allow a more efficient use of Customs employees and facilitate operations for many of the users of Customs services. Comments on the desirability of this proposed realignment are being solicited.

DATE: Comments must be received on of before May 17, 1994.

ADDRESSES: Comments (preferably in triplicate) may be submitted to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, NW., Washington, D.C. 20229, and may be inspected at Franklin Court, 1099 14th Street, NW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Brad Lund, Office of Inspection and Control (202) 927–0192.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of its continuing effort to utilize its personnel, facilities and resources more efficiently, and to provide better service to the public, importers and carriers, Customs is proposing to realign the boundaries of its Tampa and Miami Districts. The proposed realignment would give jurisdiction over all cities and counties along the West coast of Florida to the Tampa District. This would be accomplished by removing the counties of Collier and Hendry from the Miami District and adding them to the Tampa District.

The proposed realignment will permit personnel from the Tampa District to serve the areas of Collier and Hendry counties which are currently under the jurisdiction of the Miami District. Currently, aircraft inspection clearances from Naples, which is in Collier County, must be coordinated by personnel from the Miami District which is headquartered approximately 120 miles away while personnel from the Tampa District are stationed at the Southwest Regional Airport in Fort Myers, only 20 miles distant.

An additional reason supporting the change is that the proposed District boundaries would also conform to the current jurisdictional boundaries of the Customs Office of Enforcement. The enforcement boundaries were realigned in 1989 so that they would coincide with the jurisdictional boundaries of the U.S. Attorney's office and provide for a uniformity of treatment for all liquidated damage, penalty and seizure cases instituted in the state. If the proposed change is adopted, all Customs transactions can be handled within the same District offices.

Support for the proposal has been voiced by several elements of the regional importing community who anticipate improved service from a local headquarters.

It is not anticipated that this proposal will have any impact on the staffing level in either District.

PROPOSED BOUNDARIES OF TAMPA

The proposed new boundaries of the Tampa, Florida, District are as follows:

The North shore of the St. Marys River and the city of St. Marys Ga., and all the State of Florida except the counties of Indian River, St. Lucie, Martin, Okeechobee, Palm Beach, Broward, Monroe, Dade.

PROPOSED BOUNDARIES OF MIAMI

The proposed new boundaries of the Miami, Florida, District are as follows:

The counties of Indian River, St. Lucie, Martin, Okeechobee, Palm Beach, Broward, Monroe, and Dade.

If the proposed district boundaries are adopted, the lists of Customs regions, districts, and ports of entry in 19 CFR 101.3(b) will be amended accordingly.

AUTHORITY

These changes are proposed under the authority of 5 U.S.C. 301, 19 U.S.C. 2, 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1623, 1624.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m., at the Regulations Branch, Suite 4000, 1099 14th Street NW., Washington, D.C.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Customs establishes the boundaries of the various districts throughout the United States to enable it to best perform its mission and to serve the public as efficiently as possible. Although this document is being issued with notice for public comment, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553 because it relates to agency management and organization. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act 95 U.S.C. 601 *et seq.*). Because this document relates to agency organization and management, it is not subject to E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: February 11, 1994.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 18, 1994 (59 FR 12879)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 94–39)

UNITED STATES, PLAINTIFF *v.* MODES, INC. AND JAIKISHAN BUDHRANI, DEFENDANTS

Court No. 89–04–00206

[Defendants' application for fees and expenses pursuant to Equal Access to Justice Act denied.]

(Decided March 4, 1994)

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U. S. Department of Justice; *Velta A. Melnbrencis*, Assistant Director; *(Michael S. Kane*, Esq., Attorney), for plaintiff.

Wilson, White & Copeland (Claude R. Wilson, Jr., Esq.), for defendants.

OPINION AND ORDER

NEWMAN, *Senior Judge:* Pursuant to Rule 68 of this court, defendants seek attorneys' fees and expenses under the Equal Access to Justice Act, 28 U.S.C. §§ 2412(d)(1)(A) and 2412(b)(1988) (the "EAJA"). The court finds that the motion is without support in law because the prerequisites of the EAJA are not satisfied. Defendants' motion is accordingly denied.

BACKGROUND

The instant motion represents, hopefully, the final phase of a protracted litigation involving several courts and considerable pre-trial motion practice. Familiarity with the earlier proceedings is presumed, although the relevant aspects are summarized here for convenience.

In 1984, defendants were engaged in the importation of "twist beads" under TSUS item 740.38, which were entered free of duty under the Generalized System of Preferences ("GSP"), 19 U.S.C. § 2461, *et seq.* Defendants submitted false invoices to the Customs Service, misstating the value of the merchandise. Although the false statements did not result in the nonpayment of any duty, they were in violation of 19 U.S.C. §§ 1484, 1485, which prohibit false declarations of value in Customs invoices and provide for statistical compilation by the Treasury Department of, among other things, the value of goods imported into the United States.

In August 1984, Customs discovered defendants' double invoicing scheme and commenced an investigation. The Government subsequently issued administrative summonses seeking the relevant invoices, waybills and other entry documents at issue in this case. Prior to the return date listed on the summonses, a Customs agent at Dallas/Fort Worth Airport conducted an illegal search of certain files belonging to defendants' counsel, in violation of the fourth amendment. A second set of summonses was subsequently issued, which defendants resisted. The United States Court of Appeals for the Fifth Circuit held that the summonses could be enforced. *See United States v. Wilson,* 864 F.2d 1219 (5th Cir.), *cert. denied,* 492 U.S. 918 (1989).

Customs issued a pre-penalty notice demanding the payment of a civil penalty in the amount of $3,867,856.00. Subsequently, defendants submitted a petition for mitigation of the penalty, and in accordance with 19 C.F.R. § 171.31a (1988), on February 28, 1989 Customs rendered a final written determination and advised defendants that it would mitigate the penalty to $966,964.00. Although Customs stated that Modes could submit a supplemental petition, it conditioned any reconsideration of the mitigation issue upon defendants' submission to an extension of the statute of limitations. When defendants failed to agree to such an extension, the Government commenced the instant litigation to recover a civil penalty pursuant to section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1988). *See generally, United States v. Modes, Inc.,* 13 CIT 780, 723 F. Supp. 811 (1989).

Subsequent to the filing of this action, defendants filed a motion to suppress the invoices and other documentation that had been illegally seized by Customs. This court held that, although the airport search violated the fourth amendment, the independent source exception to the fourth amendment exclusionary rule applied and accordingly held that the contents of the briefcase should not be suppressed. *See United States v. Modes, Inc.,* 16 CIT ___, 787 F. Supp. 1466, 1475–76 (1992). Subsequently, the court granted the Government's motion for partial summary judgment on the count of fraudulent violations of section 592, i.e., the highest degree of culpability under the statute. *See United States v. Modes, Inc.,* 16 CIT ___, 804 F. Supp. 360 (1992).

A bench trial was then conducted on April 1, 1993 by the undersigned to resolve the remaining factual issues pertaining to the subject of *quantum*. Prior to trial, the parties stipulated that the domestic value of the merchandise was $2,325,000.[1] After analyzing several relevant factors in light of the evidence adduced at trial, the court determined that a penalty of $50,000 was appropriate and entered judgment in that amount in favor of the Government. *See United States v. Modes, Inc.,* 826 F. Supp. 504 (1993). The Government had sought the maximum penalty provided by the statute, and initially appealed the court's decision as to *quantum,* but obtained an order of voluntary dismissal from the United

[1] 19 U.S.C. § 1592(c) specifies that "[a] fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise."

States Court of Appeals for the Federal Circuit pursuant to Fed. R. App. P. 42(b) as of December 3, 1993. Defendants now seek to recover attorneys' fees and expenses under the EAJA.

DISCUSSION

I

Fundamentally, a statute authorizing the recovery of attorneys' fees and expenses from an agency of the United States constitutes a waiver of sovereign immunity, and must be strictly construed. *Library of Congress v. Shaw,* 478 U.S. 310 (1986). In the case at bar, defendants base their entitlement to attorneys' fees and expenses on either of two provisions of the EAJA. First, defendants predicate recovery on 28 U.S.C. § 2412(d)(1)(A) which provides, in relevant part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

In the alternative, defendants argue that they are entitled to recover under 28 U.S.C. § 2412(b), which states:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

As each of the above statutory provisions plainly demonstrates, the threshold requirement for recovery of attorneys' fees and expenses under the EAJA is that the applicant be a "prevailing party." Defendants urge that they are "prevailing parties" because the Government obtained a penalty well below the amount it had sought. The Government counters that it is the prevailing party, and not defendants, because it obtained judgment on the merits at the summary judgment phase of the litigation, and recovered a penalty against defendants. The court agrees with the Government.

A prevailing party is defined as one that "'succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1982) (quoting *Nadeau v. Helgemoe,* 581 F.2d 275, 278–79 (1st Cir. 1978). *See also, A. Hirsh, Inc. v. United States,* 14 CIT 23, 747 F. Supp. 723, 725

(1990), *aff'd*, 948 F.2d 1240 (Fed. Cir. 1991). Here, the prevailing party under the relevant analysis is, clearly, the Government. The court entered summary judgment in favor of plaintiff, finding that defendants were liable for fraudulent invoicing in connection with each of the 74 entries listed in the complaint. The Government further obtained a substantial penalty.[2]

Notwithstanding the language of the statute and the obvious force of precedent, defendants urge that, because they were assessed a penalty that was little more than one percent of the amount sought, they are prevailing parties as to "99% of the amount at issue." Defendants' Brief at 2. However, defendants offer no authority for the novel proposition that the *size* of the penalty ultimately awarded, either in relation to the maximum amount allowable under the statute or the *quantum* sought by the Government, should be determinative of the Government's status as a prevailing party under section 2412.

Moreover, the court observes that in one published decision of the United States Court of Appeals for the Eighth Circuit, a nearly identical proposition was considered and soundly rejected within the context of the EAJA. In *Beall Const. Co. v. Occupational Safety & H. Rev. Com'n*, 507 F.2d 1041 (8th Cir. 1974), OSHA compliance officers assessed a proposed penalty against a contracting firm in the amount of $31,744 for one serious violation of OSHA regulations due to the improper barricading of an elevator shaft in a multi-story building then under construction in Fremont, Nebraska. OSHA also assessed penalties amounting to $3,698 for several other violations found to exist on the construction site. *See id.* at 1043. An Administrative Law Judge vacated the proposed penalty of $31,744, finding that the shaft was properly barricaded, but found that there was substantial evidence to support the other penalties. On review of the Administrative Law Judge's decision, the Occupational Safety and Health Review Commission affirmed as to the existence of the violations but reduced the penalties yet further, to $620! *See id.*

The construction company appealed the decision on constitutional grounds, and further advanced the theory that, because it had succeeded in obtaining dismissal of one penalty and reduction of the remaining ones, it was a prevailing party within the meaning of section 2412. Inasmuch as the Eighth Circuit found no error in the Commission's findings that the construction company had violated OSHA regulations and affirmed the award of a penalty, that court accordingly held that the petitioner was not a prevailing party and was not entitled to recover costs or attorneys' fees. *See id.* at 1047.

Similarly, in *Johnson v. Secretary Of/And U.S. Dept. of HUD*, 594 F. Supp. 265, 267 (E.D. La. 1984) the Government took the position that it, not the plaintiff, was the prevailing party because three of the plain-

[2] It should be recalled that at common law, a plaintiff who obtains judgment is the prevailing party, even if the plaintiff recovers nothing more than nominal damages. *See* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 10 *Federal Practice and Procedure*, § 2667 (2d. ed. 1983); *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993 (5th Cir. 1976); *Burk v. Unified School Dist. No. 329*, 116 F.R.D. 16, 17–8 (D. Kan. 1987).

tiff's four claims had been dismissed, and the plaintiff had only obtained a mere fraction of his claimed damages of over one million dollars. The *Johnson* court rejected the Government's position, holding that the plaintiff was entitled to fees and expenses under the EAJA because the plaintiff had obtained success on one of his claims, even if the amount of the recovery was small. *See id.* Thus, following the logic of *Beall* and *Johnson,* the Government is the prevailing party here because it obtained judgment under section 592, notwithstanding that the sum it recovered in damages was far below the amount prayed for in the complaint.

II

Although the court bases its decision upon the determination that the instant defendants are not prevailing parties, it should be noted that defendants' application would fail in any event, since the remaining elements of a claim under sections 2412(d)(1)(A) and 2412(b) are not satisfied in this case. The court will briefly address each of the two provisions in turn.

A

Defendants seek to recover fees and expenses under section 2412(d)(1)(A), which provides that a party prevailing against the United States shall recover fees and expenses "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." The term "substantially justified" has been interpreted by the Supreme Court to mean, "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood,* 487 U.S. 552, 565 (1988). Consequently, the Government must show that it "was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts. The Government must show that it has not 'persisted in pressing a tenuous factual or legal position, albeit one not wholly without foundation.'" *Gavette v. Office of Personnel Management,* 808 F.2d 1456, 1467 (Fed. Cir. 1986) (en banc) (emphasis in original) (quoting *Gava v. United States,* 699 F.2d 1367, 1375 (Fed. Cir. 1983) (Baldwin, J., dissenting)). In the same vein, it must be recalled that, even if defendants could be said to be prevailing parties in any stage of this case, the court's inquiry as to whether the Government's position was substantially justified for EAJA purposes is distinct from the decision on the merits. *See United States v. F.H. Fenderson, Inc.,* 11 CIT 657, 661, 670 F. Supp. 1015, 1018 (1987) (citing *Luciano Pisoni Fabbrica Accessori v. United States,* 11 CIT 280, 658 F. Supp. 902, 905 (1987), *aff'd,* 6 Fed. Cir. (T) 57, 837 F.2d 465 (Fed. Cir.), *cert. denied,* 488 U.S. 819 (1988)).

Defendants compare the instant action to *ICI Worldwide, Inc. v. United States,* 14 CIT 201 (1990), in which the court granted an award of attorneys' fees and expenses to the plaintiff. There, ICI Worldwide had challenged Customs' denial of its protest in connection with the importation of Halloween costumes, which Customs had erroneously clas-

sified as "wearing apparel" under TSUS item 384.94, rather than "toy figures" or "toys" under TSUS items 737.40 and 737.98, respectively. The court determined that Customs' position was not substantially justified, because a Customs Service Headquarters Ruling published prior to the denial of the protest had plainly contradicted its stated position that the costumes were wearing apparel. *See id.* Fees and expenses were granted, inasmuch as the agency's denial of the protest was without substantial justification and "[p]laintiff should not have been put to the expense of commencing a lawsuit." *Id.* at 202.

The court is not persuaded that *ICI Worldwide* is apposite to the case at bar. Examining the merits of the instant case, the court is fully satisfied that here the Government's position was, in fact, substantially justified throughout the prosecution of its case against defendants. Indeed, the Government enjoyed unqualified success at every stage, with the sole, qualified exception of the *quantum* proceedings. From the beginning, the Government possessed evidence of double invoicing on the part of defendants. As to the issue of liability at least, there can be no question but that the Government's position was well grounded in law and fact. Turning to the penalty proceedings, it is true that the Government obtained a penalty that was well below the amount it had sought. Nevertheless, even at the penalty stage, the Government's position could hardly be deemed to be without substantial justification. The court heard evidence relating to, *inter alia,* defendants' intentional violation of the statute, and in consideration of which the court assessed a penalty that was not insubstantial. Additionally, the legitimacy of the Government's interest in ensuring the integrity of the GSP program, as well as the accuracy of entry documentation, is undeniable and also constituted substantial justification for the prosecution of this case. *See United States v. F.A.G. Bearings, Ltd.,* 8 CIT 294, 296, 598 F. Supp. 401, 403–4 (1984) (purpose of section 592 is to ensure accuracy in submission of Customs documentation). Thus, defendants assuredly would not be entitled to recover under section 2412(d)(1)(A).

B

Defendants further seek to recover fees and expenses in conformity with section 2412(b), which provides that the United States "shall be liable for * * * fees and expenses to the same extent that any other party would be liable under the common law." Accordingly, fees and expenses are recoverable in cases where the Government "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Bonanza Trucking Corp. v. United States,* 11 CIT 436, 441, 664 F. Supp. 1453, 1457 (1987) (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.,* 417 U.S. 116, 129 (1974)). Courts grant awards under section 2412(b) only "'in exceptional cases and for dominating reasons of justice.'" *Beaudry Motor Co. v. Abko Properties, Inc.,* 780 F.2d 751, 756 (9th Cir.), *cert. denied,* 479 U.S. 825 (1986) (citations omitted). Moreover, defendants' burden under the bad faith standard is yet more exacting than under the

substantial justification test. *See D & M Watch Corp. v. United States*, 16 CIT ___, 795 F. Supp. 1160, 1171 (1992).

It is, of course, basic to the court's review of this matter that public officials are *presumed* to have acted in good faith and in the spirit of fair dealing in the discharge of their official duties. *See United States v. Roses, Inc.*, 1 Fed. Cir. (T) 39, 43, 706 F.2d 1563, 1566 (Fed. Cir. 1983) (citing *Kalvar Corp. Inc. v. United States*, 543 F.2d 1298, 1301–2 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977) (court requires "well-nigh irrefragable proof" that government was motivated by malice or a specific intent to injure private party)). Here, defendants paint for the court a picture of egregious governmental misconduct. In particular, defendants make much of the illegal search of Wilson's files at the Dallas/Fort Worth Airport. Continuing, defendants suggest that the Government abused the legal process, causing them to expend vast sums in legal defense that were out of proportion to the wrong committed. Defendants further state that they were "never given an opportunity to settle this case for anything they could afford to pay." Defendants' Brief at 4–5. Defendants baldly conclude that the Government "continued to beat defendants to death with the legal process." *Id.* at 5.

The issues surrounding the Government's alleged bad faith are in large part the subject of "finger pointing" and accusations expressed through unsworn statements in the briefing papers. Suffice it to say at this juncture, however, that defendants have not established that the Government's litigation tactics bore the hallmarks of harassment. The court's inquiry here is directed at whether the Government acted in bad faith in the course of its administrative proceedings as well as its prosecution of the instant litigation. In view of all the facts and circumstances, the court considers that the illegal search and seizure of Wilson's files, while disturbing, can and should be viewed in isolation from the Government's overall conduct of the proceedings against defendants.[3] Further, the court finds that the same factors that provided substantial justification for the Government's posture, both at the administrative level and during the litigation, belie any suggestion that the Government's prosecution of this case proceeded from anything other than a legitimate enforcement of the Customs laws. In particular, it appears that defendants obtained the full measure of administrative due process to which they were entitled before initiation of this lawsuit. *United States v. Modes, Inc.*, 723 F. Supp. 811 (1989). As to the litigation, there is no evidence to suggest that the Government's case was not meritorious, or that its motives in seeking the relief authorized by the statute were in any way suspect. In brief, that the court took defendants' financial difficulties into consideration, and thereby imposed a relatively lenient penalty, reflected neither bad faith on the Government's part nor a victory for defendants.

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[3]It is not insignificant that the Government had already demanded production of the invoices before the illegal seizure of Wilson's files. *Wilson*, 864 F.2d at 1223.

CONCLUSION

It bears repetition that defendants' application for attorney's fees and expenses is as devoid of support in caselaw and statute as it is in common sense. Defendants were not "successful as to 99% of the relief sought"; nor did the Government's case lack merit. Rather, the court arrived at a calculation of the award after considering the evidence adduced at trial in the light of all factors relevant to the imposition of a penalty. The court's restraint in assessing that penalty in no way diminished or excused defendants' disgraceful conduct in using false invoices to assist their foreign associate to violate his nation's tax laws. The court's decision in this matter, 826 F. Supp. 504, speaks entirely for itself, and in no respect lends support to defendants' claim for fees and expenses under the EAJA Indeed, by their application defendants strayed dangerously close to the point where the court might have considered the imposition of sanctions against them.

Defendants' application for attorney's fees and expenses is DENIED.

IT IS SO ORDERED.

(Slip Op. 94–40)

FEDERAL-MOGUL CORP, PLAINTIFF AND PLAINTIFF-INTERVENOR, AND TORRINGTON CO., PLAINTIFF AND PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP, NTN CORP, KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., PEER BEARING CO., NSK LTD., NSK CORP, CATERPILLAR INC., MINEBEA CO., LTD., AND NMB CORP, DEFENDANT-INTERVENORS

Consolidated Court No. 91–07–00530 and 91–08–00569

Plaintiff-intervenor, The Torrington Company, moves pursuant to Rules 1 and 7 of the Rules of this Court for modification of this Court's decision in *Federal-Mogul Corp. v. United States*, 17 CIT ____, Slip Op. 93–180 (Sept. 14, 1993), asking this Court to remand this case to the Department of Commerce, International Trade Administration ("ITA"), to recalculate all antidumping duty margins without allowing a deduction for pre-sale inland freight in the calculation of foreign market value ("FMV") pursuant to the United States Court of Appeals for the Federal Circuit's decision in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, No. 93–1239 (Fed. Cir. Jan. 5, 1994).

Held: This case is remanded to the ITA to allow the ITA to determine whether it has statutory authority to adjust FMV, calculated using purchase price, for pre-sale inland freight in light of *Ad Hoc Comm.*, No. 93–1239.

[Plaintiff's motion granted in part; case remanded.]

(Dated March 7, 1994)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Joseph A. Perna, V and *Larry Hampel)* for plaintiff and plaintiff-intervenor Federal-Mogul Corporation.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Wesley K. Caine, Christopher J. Callahan, John M. Breen, Geert De Prest, Margaret E.O. Edozien, Lane S. Hurewitz, Patrick J. McDonough, Robert A. Weaver and *Amy S. Dwyer)* for plaintiff and plaintiff-intervenor The Torrington Company.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis* and *Jane E. Meehan);* of counsel: *John D. McInerney,* Acting Deputy Chief Counsel for Import Administration, *Dean A. Pinkert, Stephen J. Claeys* and *Craig R. Giesze,* Attorney-

Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Neil R. Ellis, Susan E. Silver and *Niall P. Meagher)* for defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger, Kazumune V. Kano and *Diane A. MacDonald)* for defendant-intervenors NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation.

Coudert Brothers (Robert A. Lipstein, Matthew P. Jaffe, Nathan V. Holt and *Grace W. Lawson)* for defendant-intervenors NSK Ltd. and NSK Corporation.

Venable, Baetjer, Howard & Civiletti (John M. Gurley, John C. Dibble and *Lindsay B. Meyer)* for defendant-intervenor Peer Bearing Company.

Powell, Goldstein, Frazer & Murphy (Richard M. Belanger, Neil R. Ellis and *D. Christine Wood)* for defendant-intervenor Caterpillar Inc.

Arent, Fox, Kintner, Plotkin & Kahn (Michele N. Tanaka and *Peter Sultan)* for defendant-intervenors Minebea Co., Ltd. and NMB Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiff-intervenor, The Torrington Company ("Torrington"), moves pursuant to Rules 1 and 7 of the Rules of this Court for modification of this Court's decision in *Federal-Mogul Corp. v. United States,* 17 CIT ____, Slip Op. 93–180 (Sept. 14, 1993), asking this Court to remand this case to the Department of Commerce, International Trade Administration ("ITA"), to recalculate all antidumping duty margins without allowing a deduction for pre-sale inland freight in the calculation of foreign market value ("FMV") pursuant to the United States Court of Appeals for the Federal Circuit's ("Federal Circuit") decision in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* No. 93–1239 (Fed. Cir. Jan. 5, 1994). *Motion of The Torrington Company for Modification of Judgment and for Order of Remand ("Torrington's Motion")* at 1–2.

BACKGROUND

In *Federal-Mogul,* 17 CIT at ____, Slip Op. 93–180 at 7, this Court stated that:

> The ITA's decision to compare U.S. price to home market price at a contemporaneous point in the chain of commerce is reasonable. *Torrington Co. v. United States,* 17 CIT ____, ____, 818 F. Supp. 1563, 1576 (1993). In this case, the ITA has chosen an ex-factory price as the contemporaneous point in the chain of commerce. In order to make this comparison, certain expenses need to be removed from both U.S. and home market prices. This Court finds nothing unreasonable in the ITA's removal of pre-sale movement expenses from both U.S. and home market prices as measured from the same point in the chain of commerce, in this case ex-factory. *Id.; Ad Hoc Comm.,* 16 CIT at ____, 787 F. Supp. at 211–13. This method of treating pre-sale home market movement expenses has also been specifically upheld by this court in a well reasoned opinion in *Nihon Cement Co. v. United States,* 17 CIT ____, ____, Slip Op. 93–80 at 30–34 (May 25, 1993).
>
> Therefore, this Court affirms the ITA's deduction of pre-sale movement expenses from FMV.

DISCUSSION

The Federal Circuit in *Ad Hoc Comm.* stated:

> In the circumstances of this case, we believe that had Congress intended to deduct home-market transportation costs from FMV, it would have made that intent clear. FMV and USP [United States price] are intimately related concepts, given full meaning only by their relationship to one another. The Antidumping Act revolves around the difference between the two. *See* 19 C.F.R. § 353.2(f)(1) (1993) (defining dumping margin with reference to USP and FMV). In slightly different forms, the USP provision, 19 U.S.C. § 1677a, and the FMV provision, 19 U.S.C. § 1677b, were passed together as part of the original Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921). From the Act's beginning, therefore, it is likely Congress has considered one only with reference to the other and has been well aware of any differences between them. That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV.

Ad Hoc Comm., No. 93–1239 at 7–8 (footnote omitted).

Torrington argues that the Federal Circuit's decision in *Ad Hoc Comm.* "held that the Department of Commerce lacks authority under the circumstance-of-sale provision (19 U.S.C. § 1677b(a)(4)) to adjust foreign market value for pre-sale inland freight expense." *Torrington's Motion* at 2. Therefore, Torrington argues that this Court's decision affirming the ITA's grant of an adjustment to FMV for pre-sale inland freight was in error and this Court should modify its decision on this issue and remand this case back to the ITA ordering the ITA to recalculate all antidumping duty margins without allowing a deduction for pre-sale inland freight in the calculation of FMV. *Id.*

Defendant and defendant-intervenors, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo") and NSK Ltd. and NSK Corporation ("NSK"), oppose Torrington's motion. Specifically, defendant and Koyo argue that the Federal Circuit's decision in *Ad Hoc Comm.* only applies to adjustments to FMV for pre-sale inland freight in situations where FMV has been calculated based upon purchase price.[1] Defendant and Koyo point out that the Federal Circuit explicitly limited its decision on this issue to the calculation of FMV based upon purchase price and

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[1] Purchase price and exporter's sales price ("ESP") are the two types of United States price. USP, purchase price and ESP are defined at 19 U.S.C. § 1677a (1988):

> **(a) United States price**
>
> [T]he term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.
>
> **(b) Purchase price**
>
> "[P]urchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States.
>
> **(c) Exporter's sales price**
>
> "[E]xporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter * * *.

The purchase price is normally used as USP where the transaction prior to importation is between unrelated parties, or at arm's length. The exporter's sales price will be used as the USP when the U.S. importer and the foreign seller are "related parties." *See* 19 U.S.C. § 1677(13) (1988). The exporter's sales price will be the price at which the merchandise is first sold to an unrelated purchaser in the United States. 19 U.S.C. § 1677a(c).

not when exporter's sales price ("ESP") is used to calculate FMV. *Defendant's Opposition to Plaintiff's Motion to Modify Judgment and for Order of Remand ("Defendant's Opposition")* at 2; *Response of Defendant-Intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. to Plaintiff's Motion for Modification of Judgment and for Order of Remand ("Koyo's Response")* at 2.

Koyo points out that the vast majority of its sales during the period of review for this administrative review were ESP transactions and therefore not effected by *Ad Hoc Comm. Koyo's Response* at 2–3.

Defendant and NSK also argue that the Federal Circuit's decision on this issue was based on the ITA's stated rationale for its decision, *i.e.*, the ITA's inherent authority to fill gaps in the statutory framework to achieve the purposes of the statute, and not on the circumstance of sale provision found at 19 U.S.C. § 1677b(a)(4)(B) (1988). *Defendant's Opposition* at 2; *Defendant-Intervenors' Opposition to The Torrington Company's Motion for Modification of Judgment and for Order of Remand* at 2.

Finally, defendant argues that the ITA has not had an opportunity to consider its position on this issue in light of the Federal Circuit's decision in *Ad Hoc Comm.* Defendant requests this Court to remand this issue to the ITA so it can "consider the appellate decision and its impact upon this case and whether other alternatives exist for treatment of pre-sale inland freight expenses." *Defendant's Opposition* at 2.

This Court finds that Torrington's characterization of the Federal Circuit's decision in *Ad Hoc Comm.* is incorrect on certain points. First, the *Ad Hoc Comm.* court specifically noted that it was not ruling on whether the ITA has authority to adjust FMV for pre-sale inland freight pursuant to the circumstance of sale provision at 19 U.S.C. § 1677b(a)(4)(B). *Ad Hoc Comm.*, No. 93–1239 at 5 n.8. Second, the *Ad Hoc Comm.* court limited its decision to the calculation of FMV in purchase price situations only. *Id.* at 5. Therefore, this Court finds that there is no basis for remanding this case to the ITA in regard to situations where FMV was calculated based upon ESP.

It is a cardinal rule of administrative law that an agency should be allowed to decide an issue for itself before a court addresses that issue. *McKart v. United States*, 395 U.S. 185, 194 (1968). This Court agrees with the ITA that it should be given the opportunity to address this issue first in light of the Federal Circuit's decision in *Ad Hoc Comm.*

Therefore, this case is remanded to the ITA to allow the ITA to determine whether it has statutory authority to adjust FMV, calculated using purchase price, for pre-sale inland freight in light of *Ad Hoc Comm.*, No. 93–1239. Remand results are to be filed with this Court within sixty (60) days after the date of entry of this Court's decision regarding the ITA's remand results on the value added tax issue which is currently pending before this Court. Comments or responses by the parties are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 94–41)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS

Court No. 91–07–00486

Plaintiff moves pursuant to Rule 59(e) of the Rules of this Court to amend the judgment entered in *Timken Co. v. United States*, 18 CIT ____, Slip Op. 94–1 (Jan. 3, 1994), asking this Court to remand this case to the Department of Commerce, International Trade Administration ("ITA"), to recalculate all antidumping duty margins without allowing a deduction for pre-sale inland freight in the calculation of foreign market value ("FMV") pursuant to the United States Court of Appeals for the Federal Circuit's decision in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, No. 93–1239 (Fed. Cir. Jan. 5, 1994).

Held: This case is remanded to the ITA to allow the ITA to determine whether it has statutory authority to adjust FMV, calculated using purchase price, for pre-sale inland freight in light of *Ad Hoc Comm.*, No. 93–1239.

[Plaintiff's motion granted in part; case remanded.]

(Dated March 7, 1994)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., John M. Breen, Margaret E.O. Edozien, William A. Fennell and *Lane S. Hurewitz);* of counsel: *Scott A. Scherff,* Managing Attorney, The Timken Company, for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Michael S. Kane);* of counsel: *Joan L. MacKenzie*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Susan P. Strommer, Susan E. Silver, Niall P. Meagher, Elizabeth C. Hafner and *Robert A. Calaff)* for defendant-intervenor Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Donohue and Donohue (Joseph F. Donohue, Jr., Kathleen C. Inguaggiato and *Daniel W. Dowe)* for defendant-intervenor NSK Ltd. and NSK Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Timken Company ("Timken"), moves pursuant to Rule 59(e) of the Rules of this Court to amend the judgment entered in *Timken Co. v. United States,* 18 CIT ____, Slip Op. 94–1 (Jan. 3, 1994), asking this Court to remand this case to the Department of Commerce, International Trade Administration ("ITA"), to recalculate all antidumping duty margins without allowing a deduction for pre-sale inland freight in the calculation of foreign market value ("FMV") pursuant to the United States Court of Appeals for the Federal Circuit's decision in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* No. 93–1239 (Fed. Cir. Jan. 5, 1994). *Motion of The Timken Company to Alter or Amend Judgment ("Timken's Motion").*

BACKGROUND

In *Timken,* 18 CIT at ____, Slip Op. 94–1 at 24, this Court stated that:

> The ITA's decision to compare U.S. price to home market price at a contemporaneous point in the chain of commerce is reasonable. This Court finds nothing unreasonable in the ITA's removal of pre-sale movement expenses from both U.S. and home market prices as measured from the same point in the chain of commerce. *Ad Hoc*

Comm., 16 CIT at ____, 787 F. Supp. at 211–13. This method of treating pre-sale home market movement expenses has also been specifically upheld by this court in a well reasoned opinion in *Nihon Cement Co. v. United States*, 17 CIT ____, ____, Slip Op. 93–80 at 30–34 (May 25, 1993).

Therefore, this Court affirms the ITA's deduction of NSK's pre-sale movement expenses from FMV.

DISCUSSION

The Federal Circuit in *Ad Hoc Comm.* stated:

> In the circumstances of this case, we believe that had Congress intended to deduct home-market transportation costs from FMV, it would have made that intent clear. FMV and USP [United States price] are intimately related concepts, given full meaning only by their relationship to one another. The Antidumping Act revolves around the difference between the two. *See* 19 C.F.R. § 353.2(f)(1) (1993) (defining dumping margin with reference to USP and FMV). In slightly different forms, the USP provision, 19 U.S.C. § 1677a, and the FMV provision, 19 U.S.C. § 1677b, were passed together as part of the original Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921). From the Act's beginning, therefore, it is likely Congress has considered one only with reference to the other and has been well aware of any differences between them. That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV.

Ad Hoc Comm., No. 93–1239 at 7–8 (footnote omitted).

Timken argues that the Federal Circuit's decision in *Ad Hoc Comm.* held that the Department of Commerce lacks authority under the circumstance-of-sale provision to adjust foreign market value for pre-sale inland freight. *Timken's Motion.* Therefore, Timken argues that this Court's decision affirming the ITA's grant of an adjustment to FMV for pre-sale inland freight was in error and this Court should modify its decision on this issue and remand this case back to the ITA ordering the ITA to recalculate all antidumping duty margins without allowing a deduction for pre-sale inland freight in the calculation of FMV. *Id.*

Defendant-intervenors, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo"), oppose Timken's motion. Specifically, Koyo argues that the Federal Circuit's decision in *Ad Hoc Comm.* only applies to adjustments to FMV for pre-sale inland freight in situations where FMV has been calculated based upon purchase price.[1] Koyo points out that the Federal Circuit explicitly limited its decision on this issue to the calcula-

[1]Purchase price and exporter's sales price ("ESP") are the two types of United States price. USP, purchase price and ESP are defined at 19 U.S.C. § 1677a (1988):

> **(a) United States price**
> [T]he term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.
>
> **(b) Purchase price**
> "[P]urchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States.

continued

tion of FMV based upon purchase price and not when exporter's sales price ("ESP") is used to calculate FMV. Koyo points out that all its sales covered by this administrative review were ESP transactions. *Memorandum of Defendant-Intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. in Opposition to Plaintiff's Motion to Alter or Amend Judgment* at 2.

This Court finds that Timken's characterization of the Federal Circuit's decision in *Ad Hoc Comm.* is incorrect on certain points. The *Ad Hoc Comm.* court specifically limited its decision to the calculation of FMV in purchase price situations only. *Ad Hoc Comm.*, No. 93–1239 at 5. Therefore, this Court finds that there is no basis for remanding this case to the ITA in regard to situations where FMV was calculated based upon ESP.

It is a cardinal rule of administrative law that an agency should be allowed to decide an issue for itself before a court addresses that issue. *McKart v. United States*, 395 U.S. 185, 194 (1968). This Court finds that the ITA should be given the opportunity to address this issue first in light of the Federal Circuit's decision in *Ad Hoc Comm.*

CONCLUSION

Therefore, this case is remanded to the ITA to allow the ITA to determine whether it has statutory authority to adjust FMV, calculated using purchase price, for pre-sale inland freight in light of *Ad Hoc Comm.*, No. 93–1239. Remand results are to be filed with this Court within thirty (30) days after the entry of this opinion. Comments or responses by the parties are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(c) Exporter's sales price

"[E]xporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter * * *.

The purchase price is normally used as USP where the transaction prior to importation is between unrelated parties, or at arm's length. The exporter's sales price will be used as the USP when the U.S. importer and the foreign seller are "related parties." *See* 19 U.S.C. § 1677(13) (1988). The exporter's sales price will be the price at which the merchandise is first sold to an unrelated purchaser in the United States. 19 U.S.C. § 1677a(c).

(Slip Op. 94–42)

MITSUBISHI ELECTRONICS AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–12–00841

Plaintiff moves for summary judgment, claiming Customs improperly denied plaintiff's protest against the application of the automatic duty assessment provision contained in 19 C.F.R. § 353.53a(d)(1) (1988) to entries that plaintiff had made during the interim period between the publication of the preliminary and final less than fair value determinations in *64K Dynamic Random Access Memory Components (64K DRAMs) From Japan.* 50 Fed. Reg. 50,649 (Dep't Comm. 1985) (prelim. determ.); 51 Fed. Reg. 15,943 (Dep't Comm. 1986) (final determ.). Defendant cross-moves for summary judgment, arguing this Court lacks subject matter jurisdiction.

Held: (1) Plaintiff did not file a valid protest under 19 U.S.C. § 1514 that would create subject matter jurisdiction in the Court of International Trade pursuant to 28 U.S.C. § 1581(a); (2) the Court of International Trade has jurisdiction to review a challenge to the application of 19 C.F.R. § 353.53a(d)(1) under 28 U.S.C. § 1581(i)(2), (4); (3) this Court cannot exercise subject matter jurisdiction under § 1581(i) in this case because plaintiff failed to commence its action within the time allowed by 28 U.S.C. § 2636(h); and (4) this Court cannot exercise subject matter jurisdiction under § 1581(i) as Customs had already liquidated plaintiff's entries at the time when plaintiff commenced its action.

(Dated March 10, 1994)

Baker & McKenzie (Thomas P. Ondeck, Kevin M. O'Brien and *William D. Outman, II),* for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Marc E. Montalbine); Patrick V. Gallagher, Jr.,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

OPINION

CARMAN, *Judge:* Plaintiff and defendant cross-move for summary judgment pursuant to USCIT R. 56. Plaintiff brought this action to contest a decision by the United States Customs Service (Customs) denying plaintiff's protest under 19 U.S.C. § 1515(a) (1988). Plaintiff's protest challenged the application of the automatic duty assessment provision contained in 19 C.F.R. § 353.53a(d)(1) (1988) to entries that plaintiff had made during the interim period between the publication of the preliminary and final less than fair value determinations in *64K Dynamic Random Access Memory Components (64K DRAMs) From Japan.*[1] 50 Fed. Reg. 50,649 (Dep't Comm. 1985) (prelim. determ) *(Preliminary Determination);* 51 Fed. Reg. 15,943 (Dep't Comm. 1986) (final determ.) *(Final Determination).* The interim period was from December 11, 1985 until April 29, 1986. Pursuant to § 353.53a(d)(1), the Department of

[1]The regulation at issue reads as follows:

Automatic assessment of duties. (1) For orders or findings, if the Secretary does not receive a timely request under paragraph (a)(1), (a)(2), (a)(3), or (a)(5) of this section, the Secretary, without additional notice, will instruct the Customs Service to assess antidumping duties on the merchandise described in paragraphs (b)(1) through (b)(3) of this section at rates equal to the cash deposit of (or bond for) estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

19 C.F.R. § 353.53a(d)(1). This regulation now appears as 19 C.F.R. § 353.22(e) (1993).

Commerce (Commerce) ordered Customs to assess duties on entries made during the interim period using the 94 percent deposit rate in effect during that time. Plaintiff predicates jurisdiction on 28 U.S.C. § 1581(a) (1988) or, in the alternative, 28 U.S.C. § 1581(i)(2) (1988). Defendant cross-moves for summary judgment.

I

BACKGROUND

On July 15, 1985, the Department of Commerce (Commerce) commenced an antidumping duty investigation of imports of 64K dynamic random access memory components (DRAMS) from Japan. *Preliminary Determination,* 50 Fed. Reg. at 50,649. After the International Trade Commission determined there was a reasonable indication such imports were materially injuring or threatening to materially injure a United States industry, Commerce found several companies were selling or were likely to sell the imports in the United States at less than fair value. *Id.* Commerce published notice of the *Preliminary Determination* on December 11, 1985. *Id.*

Plaintiff was one of the companies investigated in the *Preliminary Determination. Id.* With respect to plaintiff, Commerce found a weighted-average dumping margin equal to 94 percent. *Id.* at 50,652. Commerce directed Customs "to suspend liquidation of all entries of 64K DRAMs from Japan that are entered, or withdrawn from warehouse, for consumption, on or after the date of publication of [the *Preliminary Determination]* in the Federal Register." *Id.* (emphasis in original). Commerce also indicated "Customs shall require a cash deposit or the posting of a bond equal to the estimated weighted-average [dumping margin] * * *." *Id.*

On April 29, 1986, Commerce issued the *Final Determination.* In the *Final Determination,* Commerce substantially revised the dumping margin it had previously established for plaintiff from 94 percent to 13.43 percent. 51 Fed. Reg. at 15,954. Commerce also directed Customs to continue to suspend liquidation of entries of the subject merchandise "entered, or withdrawn from warehouse, for consumption, on or after December 11, 1985[,]" the date on which Commerce published notice of the *Preliminary Determination. Id.* at 15,953–54. As in the *Preliminary Determination* and with respect to plaintiff, Commerce ordered Customs to "require a cash deposit or the posting of a bond equal to" the 13.43 percent dumping margin. *Id.* at 15,954.

On June 16, 1986, Commerce published an antidumping duty order for the merchandise affected by the *Preliminary* and *Final Determinations. 64K Dynamic Random Access Memory Components (64K DRAMs) From Japan,* 51 Fed. Reg. 21,781 (Dep't Comm. 1986) (antidumping duty order) *(Order).* In the *Order,* Commerce directed Customs to assess "antidumping duties equal to the amount by which the foreign market value of the merchandise subject to the order exceeds the United States price for all entries of such merchandise from Japan." *Id.* at 21,782.

Commerce also noted "[t]hese antidumping duties will be assessed on all unliquidated entries of such merchandise entered, or withdrawn from warehouse, for consumption on or after December 11, 1985, the date on which the Department published its 'Preliminary Determination' notice in the Federal Register." *Id.* (emphasis in original).

Approximately one year later, on June 5, 1987, Commerce published a notice of opportunity to request administrative review of the *Order. Antidupmping or Countervailing Duty Order, Finding, or Suspended Investigation,* 52 Fed. Reg. 21,338 (Dep't Comm. 1987) (opport. to request admin. review) *(Administrative Review Notice).* The *Administrative Review Notice* indicated any interested party under the *Order* could ask Commerce to conduct an administrative review of the *Order* for the period between "December 11, 1986 and May 31, 1987."[2] *Id.* The *Notice* allowed interested parties until June 30, 1987 to make their requests for an administrative review. *Id.* The *Notice* also indicated the following:

> If the Department does not receive by June 30, 1987 a request for review of entries covered by an order or finding listed in this notice and for the period identified above, *the Department will instruct the Customs Service to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption* and to continue to collect the cash deposit previously ordered.

Id. (emphasis added).

Neither plaintiff nor any other interested party requested an administrative review of the *Order.* Because no party sought an administrative review, Commerce relied on the automatic assessment regulation, 19 C.F.R. § 353.53a(d)(1), and instructed Customs to assess antidumping duties on plaintiff's merchandise at a rate equal to the bond for estimated duties required on the merchandise at the time of entry, or withdrawal from warehouse, for consumption. As the rate applicable to the period between the publication of the preliminary and final determinations was 94 percent, Commerce required Customs to assess plaintiff with 94 percent antidumping duties for entries made during this period. As noted previously, the period involved extended from December 11, 1985 to April 29, 1986.

On October 21, 1988, Customs liquidated the entries covered by the first administrative review period. Pursuant to Commerce's direction and with respect to entries made between December 11, 1985 to April 29, 1986, Customs assessed duties using the 94 percent deposit rate established in the *Preliminary Review.*

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[2] It appears Commerce's *Administrative Review Notice* contains a typographical error with respect to the dates that an administrative review would have covered. Under Commerce's regulations, an initial 751 review such as the one addressed in the *Administrative Review Notice* "will cover * * * entries * * * during the period *from the date of * * * suspension of liquidation to the end of the month immediately preceding the anniversary month."* 19 C.F.R. § 353.53a(b)(2) (1987) (emphasis added). Because suspension of liquidation occurred on December 11, 1985, when Commerce published notice of the *Preliminary Determination,* it would appear the period under review would be from *December 11, 1985* until May 31, 1987.

Plaintiff subsequently filed a protest with Customs on January 5, 1989. In its protest, plaintiff challenged Customs' assessment of 94 percent duties and sought interest on the amount paid in excess of the final 13.43 percent margin. On December 10, 1991, Customs denied plaintiff's protest with respect to the duties assessed, but approved the protest as to the interest accruing from monies paid. Thereafter, on February 21, 1992, plaintiff commenced this action in the Court of International Trade (CIT).

II. Contentions of the Parties

A. *Plaintiff:*

Plaintiff advances two arguments with respect to the Court's jurisdiction in this case. First, plaintiff contends this Court has jurisdiction under 28 U.S.C. § 1581(a). Pl's Reply Br. at 18, 20–21. Plaintiff argues because it could not have challenged the application of the automatic assessment provision in 19 C.F.R. § 353.53a(d)(1) in an administrative review under § 751 of the Tariff Act of 1930,[3] this action involves a protestable matter under 19 U.S.C. § 1514 as to which the Court can exercise jurisdiction under 28 U.S.C. § 1581(a). *Id.* at 18–19 (citing *Nichimen Am., Inc. v. United States*, 9 Fed. Cir. (T) 103, 938 F.2d 1286 (1991)). According to plaintiff, as the automatic assessment provision only applies when an interested party does not request an annual review, no party could ever challenge the provision's application in an annual review. *Id.* Therefore, plaintiff charges, the provision is subject to protest under 19 U.S.C. § 1514(a)(5) under *Nichimen*. *Id.*

Alternatively, should the Court determine jurisdiction is improper under § 1581(a), plaintiff asserts jurisdiction exists under § 1581(i)(2). *Id.* at 20; Transcript of Oral Argument (Tr.) at 13–14. Plaintiff claims the CIT has recognized a presumption favoring judicial review in connection with exercising § 1581(i) jurisdiction over actions such as this in which a party is aggrieved by agency action. Pl's Reply Br. at 20 (citing *Krupp Stahl A.G. v. United States*, 15 CIT 169 (1991)). Moreover, plaintiff urges this Court can exercise jurisdiction under § 1581(i) because the CIT has previously recognized it had jurisdiction under that subsection where "'the plaintiffs challenged assessment at the estimated rate and the validity of the automatic assessment regulation.'" *Id.* at 21 (quoting *Krupp Stahl*, 15 CIT at 171).

As to the merits of its case, plaintiff contends Commerce's application of 19 C.F.R. § 353a(d)(1) violates United States dumping laws and the GATT Antidumping Code. Pl's Br. at 9. Plaintiff asserts numerous GATT provisions prohibit dumping duties from exceeding final dumping margins and require Commerce to recalculate provisional duties when the duties established in a final determination are lower than the provisional duties. *Id.* at 7–10 (citing GATT arts. 2, 8, 10, 11). Plaintiff also maintains the application of § 353a(d)(1) violates the purposes of 19 U.S.C. §§ 1673, 1673f (1988) because it enables Commerce to collect

[3]Codified as amended 19 U.S.C. § 1675 (1988).

duties in excess of the final and more accurate deposit rate. *Id.* at 9–15. According to plaintiff, the preliminary rate is punitive rather than remedial in nature and, as such, contravenes the purpose of the dumping laws. *Id.* at 22. Therefore, plaintiff asserts liquidation should occur at the rate established in the *Final Determination.*

Finally, in the event the Court orders Customs to reliquidate plaintiff's entries, plaintiff argues it is entitled to interest on its overpayment of duties. Plaintiff claims such interest is due from the date the government received plaintiff's duty payments until the date the government refunds plaintiff's excess payments. *Id.* at 23–24.

B. *Defendant:*

Defendant contends this Court lacks subject matter jurisdiction to review plaintiff's challenge to the application of 19 C.F.R. § 353a(d)(1). Def's Br. at 6. Defendant maintains jurisdiction is improper under 28 U.S.C. § 1581(a) because this subsection only applies to matters that are properly protestable under 19 U.S.C. § 1514. *Id.* at 6–7 (citing *Nichimen,* 9 Fed. Cir. (T) at 103, 938 F.2d at 1286). Defendant claims the calculation of dumping duties is exclusively within the province of Commerce and, therefore, the issue raised by plaintiff in its protest was not protestable under § 1514. *Id.* at 7–9. As the matter was not protestable in the first instance with Customs, defendant urges this Court lacks jurisdiction under § 1581(a). According to defendant, plaintiff's only recourse was to seek a § 751 review from Commerce. *Id.* at 9–10.

With respect to the merits of this action, defendant contends the application of 19 C.F.R. § 353a(d)(1) to plaintiff's entries conforms to United States dumping laws and the legislative intent behind these laws. *Id.* at 10. Defendant emphasizes the § 751 administrative review proceeding is the mechanism by which Commerce assesses duties, but notes the section does not specify the manner in which Commerce must assess duties when no party requests an administrative review. *Id.* at 14. Rather, defendant claims, Congress left to Commerce's discretion the formulation of a method for duty assessment when a review is not requested. *Id.* (citing H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 181 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5220, 5298). Defendant asserts the regulation and its application in this case are reasonable because plaintiff had an opportunity to request an administrative review. *Id.* at 16–17. As such a review would have caused the final assessment to be based upon an actual review of plaintiffs entries, defendant argues plaintiff cannot now properly rely on a less accurate benchmark—the final margin—as an assessment rate. *Id.* at 17.

In addition, defendant urges Commerce's assessment methodology comports with the GATT. *Id.* In sum, defendant contends the GATT does not prohibit Commerce from assessing duties at a rate equal to the estimated deposit rate established in the preliminary determination. *Id.* at 17–18 (citing GATT arts. 8 and 11).

Finally, defendant asserts plaintiff has no authority for obtaining the interest it seeks on claimed duty overpayments. *Id.* at 21–22. According

to defendant, as plaintiff never overpaid duties, plaintiff has no basis for receiving interest from the date it made its payments. *Id.* at 22. In the event the Court orders Customs to refund any of plaintiff's duties, defendant maintains plaintiff would only be entitled to interest from the date plaintiff filed its summons. *Id.* (citing 28 U.S.C. § 2644 (1988)).

III. Discussion

The threshold issue in this case is whether this Court has subject matter jurisdiction to review a challenge to the application of the automatic assessment provisions contained in 19 C.F.R. § 353.53a(d)(1). For the reasons which follow, the Court concludes it cannot exercise jurisdiction in this case under either 28 U.S.C. § 1581(a) or (i).

A. *Application of 28 U.S.C. § 1581(a):*

Plaintiff's first jurisdictional claim relies on 28 U.S.C. § 1581(a). Section 1581(a) provides for the following: "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." Section 515 of the Tariff Act of 1930 corresponds to 19 U.S.C. § 1515 (1988), which establishes, in part, the requirement that Customs issue a decision granting or denying a protest filed under 19 U.S.C. § 1514. By its own terms and in conjunction with § 1515, the provisions in § 1581(a) indicate a party must satisfy the protest requirements contained in § 1514 before Customs may assess its claims and issue a protest denial from which the party may bring suit in the CIT pursuant to § 1581(a).

The critical aspect of § 1514 for purposes of this action is subsection (a). This subsection, in part, identifies which Customs' decisions are subject to protest as follows:

> [D]ecisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—
>
> **(1)** the appraised value of merchandise;
>
> **(2)** the classification and rate and amount of duties chargeable;
>
> **(3)** all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> **(4)** the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
>
> **(5)** the liquidation or reliquidation of an entry, or any modification thereof;
>
> **(6)** the refusal to pay a claim for drawback; and
>
> **(7)** the refusal to reliquidate an entry under section 1520(c) of this title,
>
> shall be final and conclusive upon all persons * * * unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade * * *.

19 U.S.C. § 1514(a). Plaintiff argues Customs' actions in this case are subject to protest under § 1514(a)(5). Pl's Reply Br. at 19. A cursory reading of § 1514(a) appears to support plaintiff's position. On its face, the instruction that Commerce provides to Customs pursuant to 19 C.F.R. § 353.53a(d)(1) to assess antidumping duties "at rates equal to the cash deposit of (or bond for) estimated antidumping duties required on that merchandise at the time of entry" seems to be an "order[ ]* * * entering into" a "decision [by a] Customs officer * * * as to * * * the liquidation * * * of an entry" within the meaning of § 1514(a)(5). Despite the superficial appeal of plaintiffs position, a close inspection of the overall structure of the dumping laws reveals a legislative intent to remove Customs' actions such as those underlying plaintiffs claim from the ambit of protestable events under § 1514.

In 1979, Congress enacted 19 U.S.C. § 1516a in order to create specific judicial review procedures for certain countervailing duty and antidumping proceedings. H.R. Rep. No. 317, 96th Cong., 1st Sess. 181 (1979). In promulgating this provision, Congress sought to substitute the former process which required parties to begin their challenges in the form of a protest and review before Customs with an administrative review proceeding before Commerce under § 751 or direct judicial review under § 1516a. *Id.* One year later, in 1980, Congress provided the CIT with its "major jurisdictional grants of authority" under 28 U.S.C. § 1581 and further clarified the review procedures parties must follow for obtaining relief. *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 44 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3755.

In adopting § 1581, Congress clearly intended to distinguish between claims that were subject to protest under 19 U.S.C. § 1514 and judicial review under 28 U.S.C. § 1581(a) on the one hand and claims that were subject to § 751 administrative reviews and/or judicial review under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) on the other. Specifically, Congress noted the following:

> It is the intent of the Committee that importers and their sureties not utilize proposed section 1581(a) to circumvent the exclusive method of judicial review of an antidumping * * * determination listed in section 516A of the Tariff Act of 1930 (19 U.S.C. § 1516a), as provided in that section. Section 516A of the Tariff Act of 1930 was added to that Act by the Trade Agreements Act of 1979. The 1979 Act revised the antidumping * * * statutes so as to provide, *inter alia,* that each year the administering authority must publish a statement of the proposed antidumping * * * duty to be assessed upon all merchandise covered by an antidumping duty * * * order and which entered the United States during the preceding year. Section 516A of the Tariff Act of 1930 provides that an importer must challenge the assessment or the amount of the antidumping duty to be imposed at the time of the annual publication. *An importer may not await the actual assessment of the duty, file a protest, and upon denial of the protest file a civil action in the Court of International Trade under proposed section 1581(a). Rather, the Committee intends that such actions be commenced pursuant to statutes gov-*

erning the commencement of a civil action to review the determinations listed in section 516A of the Tariff Act of 1930.

H.R. Rep. No. 1235 at 44, *reprinted in* 1980 U.S.C.C.A.N. at 3756 (emphasis added). The preceding passage clearly indicates Congress' intent to preclude parties from challenging Customs' assessment pursuant to Commerce's § 751 determination by commencing a protest proceeding under 19 U.S.C. § 1514 from which they could initiate an action in the CIT under § 1581(a).

Although Congress did not make automatic assessments arising by operation of 19 C.F.R. § 353.53a(d)(1) subject to judicial review under 19 U.S.C. § 1516a, the Court finds Customs' actions with regard to such assessments to be analogous to Customs' actions in connection with assessments following § 751 determinations. The purpose of a § 751 review is to determine assessment rates for entries made during the period under review and to establish deposit rates for future entries covered by Commerce's outstanding antidumping duty order. *Zenith Radio Corp. v. United Slates,* 1 Fed. Cir. (T) 74, 75, 710 F.2d 806, 808 (1983). Once Commerce completes its § 751 review, Commerce instructs Customs to assess duties using the assessment rate Commerce determined in the review. *See* 19 C.F.R. § 353.22(c)(10) (1993). Likewise, absent a request for an administrative review, 19 C.F.R. § 353.53a(d)(1) establishes assessment rates based on the deposit rates that Commerce establishes in its preliminary and final determinations and requires Commerce to instruct Customs to assess duties using those assessment rates. Customs' involvement in assessments pursuant to either a § 751 review or 19 C.F.R. § 353.53a(d)(1) is identical. The fact that § 353.53a(d)(1) obviates the need for Commerce to conduct an administrative review to determine the applicable assessment rates does not alter Customs' role or the distinction that Congress recognized between Customs' protestable decisions and its ministerial functions which only further Commerce's assessment determinations. *See* H.R. Rep. No. 1235 at 44, *reprinted in* 1980 U.S.C.C.A.N. at 3756. As a result, the Court finds Congress did not intend to include Customs' assessments pursuant to § 353.53a(d)(1) among the matters subject to protest under 19 U.S.C. § 1514. In short, merely because Commerce's regulation allows parties to subject themselves to § 353.53a(d)(1)'s automatic assessment mechanism by deciding not to undergo a § 751 review does not permit parties to deviate from the strict procedural scheme that Congress has established for resolving antidumping disputes. Accordingly, the Court concludes plaintiffs protest which sought to challenge the application of the regulation was invalid *ab initio.*

The Court also finds plaintiff's reliance on *Nichimen* is misplaced. In *Nichimen,* the plaintiff imported television receivers that Commerce found to be subject to antidumping duties. 9 Fed. Cir. (T) at 104, 938 F.2d at 1287. After paying assessed duties, plaintiff filed a protest with Customs under § 1514(a) and subsequently filed suit in the CIT under § 1581(a). In its action before the CIT, plaintiff raised the following

seven claims relating to Commerce's finding and Customs' subsequent liquidation: (1) Customs did not determine foreign market value and cost of production as required under 19 U.S.C. § 161 (1988); (2) the price of plaintiffs entries was no less than foreign market value or less than fair value; (3) the dumping determination underlying the duty assessment was arbitrary, capricious and an abuse of discretion, and not in accordance with law; (4) Commerce improperly applied the dumping findings to plaintiff; (5) all dumping duties on the entries had been settled under a settlement agreement entered into by the Attorney General, the Secretaries of Commerce and Treasury, and various importers, including the company for which plaintiff imported the merchandise; (6) Customs did not follow required appraisal procedures; and (7) Customs did not timely liquidate the entries. *Id.* at 104–05, 938 F.2d at 1287–88. The Federal Circuit held the first four items were not subject to protest with Customs under 19 U.S.C. § 1514 because they involve matters that plaintiff could have raised in a § 751 administrative review. *Id.* at 110, 938 F.2d at 1291–92. As to the remaining three items, the court held they were subject to protest under § 1514 and found Commerce could not have addressed them in a § 751 administrative review. *Id.* at 110–11, 938 F.2d at 1292.

In this action, plaintiff analogizes its challenge to the application of 19 C.F.R. § 353.53a(d)(1) to the matters which the *Nichimen* court found were subject to protest. Based on *Nichimen's* holdings, plaintiff argues because it could not have challenged the regulation's application in an administrative review, this action involves a protestable matter under 19 U.S.C. § 1514(a) as to which the Court can exercise jurisdiction under 28 U.S.C. § 1581(a). Pl's Reply Br. at 18–19.

Contrary to plaintiff's argument, this Court does *not* construe *Nichimen* to hold 19 U.S.C. § 1514 allows Customs to hear protests involving *any* matter that a party could not have raised in a § 751 administrative review. In short, the Court finds the Federal Circuit did *not* reason, as plaintiff suggests, that because Commerce could not have addressed the *Nichimen's* plaintiff's claims in a § 751 administrative review, the plaintiff could bring those same claims in the form of a protest under § 1514.

This Court interprets *Nichimen* to have relied exclusively on the statutorily-defined categories contained in § 1514(a) and to have determined some of plaintiffs claims fell under those categories. For example, with respect to plaintiff's fifth claim concerning the scope of the settlement agreement at issue, the Federal Circuit found the claim fell "within the general category of protestable matters set forth in 19 U.S.C. § 1514(a)(3) * * *" *Id.* at 110, 938 F.2d at 1292. The court noted "[b]ecause of the various parties and government representatives involved in the settlement, * * * Commerce should not under *the limited authority* of section 751 be considered the proper agency to interpret [the] agreement." *Id.*, 938 F.2d at 1292 (emphasis added). In addition, as to plaintiffs sixth and seventh claims pertaining to Customs' improper appraisal and untimely liquidation, the *Nichimen* court determined

"[t]hese are matters relating to the imposition of customs duties generally and not just to antidumping duties * * * [and] are squarely within subparagraphs (1) and (5) of the listing of protestable matters in 19 U.S.C. § 1514(a)." *Id.*, 938 F.2d at 1292.

In contrast to the claims addressed in Nichimen and as discussed previously, plaintiffs claims do not address actions by Customs that are protestable under § 1514. In sum, as noted above, the application of 19 C.F.R. § 353.53a(d)(1) simply does not involve a "decision" by Customs which Congress intended to be protestable. *See* H.R. Rep. No. 1235 at 44, *reprinted in* 1980 U.S.C.C.A.N. at 3756. Moreover, to the extent plaintiff's claims address the deposit rates established by Commerce, plaintiff's ability to bring such claims in an action contesting Commerce's *Final Determination* under 19 U.S.C. § 1516a(a)(2)(B)(i),[4] or in a § 751 administrative review that would be subject to challenge under § 1516a(a)(2)(B)(iii) further distinguishes its claims from those addressed in *Nichimen*.[5] Accordingly, the Court finds *Nichimen* does not support plaintiffs assertion that it could challenge the application of § 353.53a(d)(1) in a protest under 19 U.S.C. § 1514 that would give this Court jurisdiction under 28 U.S.C. § 1581(a).

B. *Application of 28 U.S.C. § 1581(i):*

Plaintiff's second jurisdictional claim relies on 28 U.S.C. § 1581(i)(2). Section 1581(i) indicates the following:

> **(i)** In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> **(1)** revenue from imports or tonnage;
>
> **(2)** tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> **(3)** embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

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[4] *See Comeau Seafoods Ltd. v. United States*, 13 CIT 923, 929, 724 F. Supp. 1407, 1413 (1989) (In the context of a countervailing duty investigation, "[a]n interested party * * * may challenge Commerce's final determination in this Court, including the methodology employed, and have the results of any rate change apply prospectively to liquidations made pursuant to the final determination."); *Ipsco Inc. v. United States*, 12 CIT 676, 680–81, 692 F. Supp. 1368, 1372–73 (1988) (discussing the Court's ability to review deposit rates established in an "original determination" and noting the reviewed rates "should govern rates for a future period or periods"); *Oki Elec. Indus. Co. v. United States*, 11 CIT 624, 631–32, 669 F. Supp. 480, 485–86 (1987) (indicating a party may challenge deposit rates in an action initiated under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) to contest a final affirmative antidumping duty determination and antidumping order); *Pistachio Group of the Ass'n of Food Indus., Inc. v. United States*, 10 CIT 440, 445–46, 638 F. Supp. 1340, 1344 (1986) (addressing the Court's power in an action challenging a final determination to hear a party's attack against the basis upon which Commerce determined the party's dumping margin and resulting deposit rate).

[5] Because § 751 enables Commerce to "review and determine * * * the amount of any antidumping duty" and requires the agency to establish deposit rates for subject entries, the statute clearly grants the agency the authority to hear challenges against deposit rates established in Commerce's preliminary and final determinations. *See* 19 U.S.C. § 1675(a)(1)(B), (a)(2); *see also Zenith*, 1 Fed. Cir. (T) at 75, 710 F.2d at 808 (one of the purposes of a § 751 review is to "establish[ ] the margins used to calculate the amount of dumping duties to be assessed on merchandise entered during the * * * period under review.").

> **(4)** administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

Customs Court Act of 1980, Pub. L. No. 96–417, 94 Stat. 1728, as amended, 28 U.S.C. § 1581(i) (1988).

It is well-settled that litigants may not invoke jurisdiction under § 1581(i) "when jurisdiction under another subsection of § 1581 *is or could have been available,* unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States,* 5 Fed. Cir. (T) 122, 124, 824 F.2d 961, 963 (1987), *cert. denied,* 484 U.S. 1041 (1988) (emphasis added); *accord Conoco, Inc. v. United States Foreign-Trade Zones Bd.,* 16 CIT ____, ____, 790 F. Supp. 279, 288 (1992), *appeal docketed,* No. 92–1396 (Fed. Cir. June 8, 1992). This Court finds the remedies provided for in § 1581(a)-(h) are unavailable in an action challenging the application of 19 C.F.R. § 353.53a(d)(1). As discussed previously, § 1581(a) is inapplicable to actions challenging the regulation's application. Similarly, § 1581(c) cannot apply to such actions because the application of the regulation does "not culminate in a final determination enumerated in 19 U.S.C. § 1516a and contestable via 28 U.S.C. § 1581(c)." *Interredec, Inc. v. United States,* 11 CIT 45, 46 n.1, 652 F. Supp. 1550, 1552 n.1 (1987) (citing *Royal Business Machs., Inc. v. United States,* 69 CCPA 61, 73–74, 669 F.2d 692, 701–02 (1981)) (other citations omitted). As none of the other remedies provided in 1581(a)-(h) is relevant to this case and the application of 19 C.F.R. § 353.53a(d)(1) pertains to the "administration and enforcement" of the laws "providing for * * * duties," the Court concludes an action challenging the regulation's application is reviewable under 28 U.S.C. § 1581(i)(2), (4). *Accord Krupp Stahl,* 15 CIT at 171; *Interredec,* 11 CIT at 46 n.1, 652 F. Supp. at 1552 n.1. Nevertheless, the Court also concludes plaintiffs failure to initiate its action within the time prescribed by 28 U.S.C. § 2636(h) (1988) and before Customs liquidated its entries precludes the Court from exercising jurisdiction in this case.

1. Statute of Limitations:

The statute of limitations which applies to actions brought pursuant to § 1581(i) resides in 28 U.S.C. § 2636(h). This provision indicates the following:

> A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)-(h) of this section, is barred *unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.*

28 U.S.C. § 2636(h) (1988) (emphasis added). According to the rules of this Court, a party commences an action pursuant to § 1581(i) "by filing concurrently with the clerk of the court a summons and complaint." USCIT R. 3(a); *cf.* 28 U.S.C. § 2632(a) (1988) (Except civil actions commenced under 28 U.S.C. § 1581(a), (b), "a civil action in the Court of International Trade shall be commenced by filing concurrently with the clerk of the court a summons and complaint, with the content and in the form, manner, and style prescribed by the rules of the court."). In this case, plaintiff filed its summons on November 25, 1991 and its complaint on February 21, 1992. Plaintiff, therefore, commenced this action on February 21, 1992.

Having determined when plaintiff commenced its action, the Court must determine when plaintiff's cause of action accrued in order to determine whether plaintiff commenced its action within the time allowed by § 2636(h). In its papers, plaintiff did not address the statute of limitations issue under § 1581(i). During oral argument, however, plaintiff indicated its position was that its cause of action accrued the day Customs notified plaintiff that Customs had decided to deny plaintiffs protest. Tr. at 17–18. Plaintiff argued "[c]ase law states that the cause of action arises when the plaintiff knew or should have known about it," thereby suggesting plaintiff was unaware of whether it had a cause of action until December 10, 1991—the date on which Customs denied plaintiff's protest. *Id.* at 17.

Plaintiff's position is unpersuasive. It is well-settled "that a claim does not accrue until the aggrieved party reasonably should have known about the existence of the claim." *St. Paul Fire & Marine Ins. Co. v. United Slates,* 10 Fed. Cir. (T) ____, ____, 959 F.2d 960, 964 (1992) (citations omitted). Plaintiff's claim in this case pertains to the application of 19 C.F.R. § 353.53a(d)(1). The plain language of § 353.53a(d)(1) indicates the regulation applies once the period of time specified in Commerce's notice of opportunity to request an administrative review passes. The regulation indicates *"if the Secretary does not receive a timely request [for an administrative review], the Secretary, Without additional notice, will instruct the Customs Service to assess antidumping duties on the merchandise."* § 353.53a(d)(1) (emphasis added). Because the period of time specified in Commerce's *Administrative Review Notice* allowed plaintiff to request an administrative review through June 30, 1987 and neither plaintiff nor any other interested party requested an administrative review by that time, § 353.53a(d)(1) became operable on July 1, 1987.[6] Because the terminology contained in both the regulation and the *Administrative Review Notice* put plaintiff on notice that its subject entries would be subject to the regulation's automatic assessment mechanism beginning July 1, 1987, the Court finds plaintiff "reasonably should have known about the existence of [its] claim" on that date. *St. Paul,* 10 Fed. Cir. (T) at ____, 959 F.2d at 964. Accordingly, the Court concludes plaintiffs cause of action accrued and the statute of

[6] *See Administrative Review Notice,* 52 Fed. Reg. at 21,338.

limitations in 28 U.S.C. § 2636(h) began to run on July 1, 1987, the day following the last day on which plaintiff could have requested an administrative review.

The Court also finds plaintiff's decision to invoke Customs' protest procedures under 19 U.S.C. § 1514 did not affect the accrual of its cause of action. Although the type of claim that a party raises and the availability of administrative remedies may affect the accrual of the party's cause of action under 28 U.S.C. § 1581(i), a party's decision to pursue *"permissive administrative remedies does not toll running of the statute of limitation[s] or delay accrual of the cause of action." Omni U.S.A., Inc. v. United States,* 11 CIT 480, 483 n.7, 663 F. Supp. 1130, 1133 n.7 (1987), *aff'd,* 6 Fed. Cir. (T) 99, 840 F.2d 912, *cert. denied,* 488 U.S. 817, *reh'g denied,* 488 U.S. 961 (1988) (citing *Lipp v. United States,* 301 F.2d 674 (Ct. Cl.), *cert. denied,* 373 U.S. 932 (1962)) (emphasis added). The need for finality, which the foregoing principle furthers, becomes more pronounced when a party pursues an administrative remedy that is unavailable as a matter of law. *Cf. Pope Prods. v. United States,* 15 CIT 484, 487 (1991) ("Assuming, *arguendo,* that the running of the statutory time limit may be tolled during certain types of administrative review proceedings, *it is determinative that the final administrative petition in this case was a nonreviewable supplemental petition for mitigation and the judicial review was available prior to completion of this administrative step.")* (emphasis added).

This latter scenario characterizes plaintiff's conduct in this case. As discussed previously, Customs' actions with respect to the application of 19 C.F.R. § 353.53a(d)(1) were not subject to protest. As a result, the protest remedy provided in 19 U.S.C. § 1514 was unavailable to plaintiff as a matter of law. Because plaintiff chose to pursue a remedy that Congress did not make available for claims such as plaintiff's, the Court finds plaintiff's protest neither delayed the accrual of plaintiff's cause of action nor tolled the statute of limitations which had began to run on July 1, 1987. *See Pope Prods.,* 15 CIT at 486–87. In sum, as plaintiff commenced its action on February 21, 1992, more than four and one half years after its cause of action accrued, the Court concludes its action is barred by the two-year statute of limitation contained in 28 U.S.C. § 2636(h).[7]

2. Customs' Liquidation:

Plaintiffs failure to seek injunctive relief against liquidation before commencing this action also precludes this Court from exercising jurisdiction under 28 U.S.C. § 1581(i). This Court has the authority under § 1581(i) to review requests for injunctions against liquidations pursuant to 19 C.F.R.§ 353.53a(d)(1). *Krupp Stahl,* 15 CIT at 171; *Interredec,* 11 CIT at 46 n.1, 652 F. Supp. at 1552 n.1. Moreover, because an injunction would prevent Customs from liquidating plaintiff's entries

[7]Even assuming the regulation did not operate against plaintiff until October 21, 1988, the date on which Customs liquidated plaintiff's entries, § 2636(h) would nevertheless bar plaintiff's action. As plaintiff filed its action three years and four months after liquidation, on February 21, 1992, the two-year statute of limitations precludes plaintiff's suit.

and thereby ensure a party would be able to benefit from judicial review of its challenge to the regulation, such relief would seem appropriate. *Cf. Zenith,* 1 Fed. Cir. (T) at 77–80, 710 F.2d at 810 (A party who wishes to challenge a § 751 determination will suffer irreparable harm if Customs liquidates their entries before the party obtains judicial review because "[t]he statutory scheme has no provision permitting reliquidation" and, therefore, renders the court "powerless to grant the only effective remedy in response" to the party's challenge.). Yet, as the *Zenith* court noted with respect to liquidations following administrative reviews, "[t]he statutory scheme has no provision permitting reliquidation" and "[o]nce liquidation occurs, a subsequent decision by the trial court on the merits * * * can have no effect on the dumping duties assessed on [subject] entries." *Id.* at 78, 710 F.2d at 810. In this case, Customs' liquidation precludes the Court from granting plaintiff the relief it now seeks. Accordingly, the-Court concludes it is unable to exercise jurisdiction over this action under § 1581(i).

IV. Conclusion

After considering all of plaintiffs' arguments, the Court makes the following holdings: (1) plaintiff did not file a valid protest under 19 U.S.C. § 1514 that would create subject matter jurisdiction in the CIT pursuant to 28 U.S.C. § 1581(a); (2) the CIT has jurisdiction under 28 U.S.C. § 1581(i)(2), (4) to review a challenge to the application of 19 C.F.R. § 353.53a(d)(1); (3) this Court cannot exercise subject matter jurisdiction under § 1581(i) over this action because plaintiff failed to commence the action within the time allowed by 28 U.S.C. § 2636(h); and (4) this Court cannot exercise subject matter jurisdiction under § 1581(i) over this action as Customs had already liquidated plaintiffs entries at the time when plaintiff commenced its action.

(Slip Op. 94–43)

TECHNICOLOR VIDEOCASSETTE, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–08–00400

Plaintiff challenges the U.S. Customs Service's ("Customs") classification of imports of plaintiff's V-O Cassettes pursuant to HTSUS subheading 3926.90.90.

Held: Plaintiff has overcome the presumption of correctness attached to Customs' classification of the subject merchandise and has demonstrated that V-O Cassettes are properly classifiable under HTSUS subheading 8522.90.9080.

[Judgment for plaintiff.]

(Dated March 10, 1994)

Leonard M. Fertman, Professional Corporation (Leonard M. Fertman) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Nancy M. Frieden)* for defendant.

Opinion

Tsoucalas, *Judge:* This action comes before the Court after trial *de novo* on October 26–27, 1993. Plaintiff, Technicolor Videocassette, Inc. ("Technicolor"), challenges the United States Customs Service's ("Customs") classification of plaintiff's V-O Cassettes as "other articles of plastics" pursuant to the Harmonized Tariff Schedule of the United States ("HTSUS") 3926.90.90. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a)(1988).

Background

V-O Cassettes, the merchandise at issue, are empty video cassette housings imported by Technicolor. They are fully assembled but contain no magnetic tape ("media"). V-O Cassettes are used solely and exclusively with video recording and/or playback machines using the video home system ("VHS") format, commonly known as video cassette recorders ("VCRs"). Trial Transcript ("T.T.") at 2.

V-O Cassettes consist of a plastic shell, two plastic spools and a non-magnetic leader tape. Plaintiff's Exhibit 10 at 1. After importation, the V-O Cassettes are sold to tape loading or duplicating firms which load blank or pre-recorded magnetic tape into the cassettes. *Id.* Once the media has been added, the resulting product becomes a VHS magnetic tape which may be used with a VCR, camcorder or for storage of computer data. *Defendant's Pretrial Memorandum of Law ("Defendant's Memorandum")* at 1–2.

Other than holding media, the V-O Cassettes protect the media with a complicated set of doors and latches and engage gears in the VCR, so that after the cassette is inserted, it is positioned properly. T.T. at 62, 67. If the V-O Cassette is defective in any way, the cassette or the media may become lodged in the VCR requiring repair by a professional; the media may become damaged and the display impaired; or the cassette may not operate altogether. *Id.* at 68–69. A VCR requires the V-O Cassettes: a VCR may not function with reels and media alone. *Id.*

On December 12, 1988, Customs issued Headquarters Ruling 082889 which classified V-O Cassettes as parts of video recorders. Plaintiff's Exhibit 10. On May 30, 1990, in Headquarters Ruling 086627, Customs reversed its position and held that V-O Cassettes were properly classified as supports similar to "[b]obbins, spools, cops, cones, and reels." Plaintiff's Exhibit 11. As such, the V-O Cassettes were deemed to fall within HTSUS subheading 3926.90.90 as "[o]ther articles of plastics." *Id.* Because the determination of whether a particular article fits within the meaning of a tariff term is one of fact, this Court may consider plaintiff's claim that a V-O Cassette is more than a bobbin, spool, reel, or cone and, if appropriate, reject Customs' classification. *See Hasbro Indus., Inc. v. United States*, 879 F.2d 838, 840 (Fed. Cir. 1989).

Plaintiff timely filed protests of Customs' classifications pursuant to 19 U.S.C. §§ 1514, 1515 (1988), which were denied, and this action ensued.

Customs classified the merchandise at issue pursuant to the following HTSUS heading:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:	
3926.90	Other:	
3926.90.90	Other	5.3%

Plaintiff contends that Customs' classification is incorrect and believes the merchandise should be classified under the following HTSUS heading:

8522	Parts and accessories of apparatus of headings 8519 to 8521:	
8522.90	Other:	
8522.90.90	Other	3.9%
8522.90.9080	Other	[3.9%]

DISCUSSION

Classification of the V-O Cassettes:

The Court notes that, pursuant to 28 U.S.C. § 2639(a)(1) (1988), tariff classifications made by Customs are presumed correct and the burden of proof is upon the party challenging the classification to prove that Customs' classification is incorrect. *See, e.g., Nippon Kogaku (USA), Inc. v. United States,* 69 CCPA 89, 92, 673 F.2d 380, 382 (1982). To determine whether the party challenging Customs' classification has overcome the statutory presumption of correctness, this Court must consider whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States,* 733 F.2d 873, 878 (Fed. Cir. 1984).

The meaning of a tariff term is a question of law to be decided by the court, whereas the determination of whether a particular article fits within that meaning is a question of fact. *Hasbro,* 879 F.2d at 840. When a tariff term is not clearly defined in either the HTSUS or its legislative history, the correct meaning of the term is generally resolved by ascertaining its common and commercial meaning. *W.Y. Moberly, Inc. v. United States,* 924 F.2d 232, 235 (Fed. Cir. 1991). In order to determine the common meaning of a tariff term, the court may rely on its own understanding of the term, as well as consult dictionaries, lexicons and scientific authorities. *Brookside Veneers, Ltd. v. United States,* 847 F.2d 786, 788 (Fed. Cir.), *cert. denied,* 488 U.S. 943 (1988).

Plaintiff argues that, because the V-O Cassette provides the tape transport mechanism for unrecorded or prerecorded magnetic tapes to be used in VCRs, it should accordingly be dutiable as a part and accessory of a VCR pursuant to HTSUS subheading 8522.90.9080. T.T. at 2, 81. Plaintiff asserts that the V-O Cassette is an essential part of the video cassette recording process, and a part and accessory which makes the VCR work. T.T. at 81, 119.

Defendant argues that the V-O Cassette is classifiable under HTSUS subheading 3926.90.90, which refers to "other articles of plastics." De-

fendant states that the merchandise is not a part and accessory of a VCR and is specifically excluded from HTSUS item 8522 ("Parts and accessories") by Section Note 1(c) to HTSUS Section XVI (excluding "[b]obbins, spools, cops, cones, cores, reels or similar supports"). *Defendant's Memorandum* at 4–9.

This Court must determine, therefore, whether the V–0 Cassette may be termed a part and accessory of a VCR.

This Court finds that there is no clearly stated Congressional intent as to the meaning of the tariff term part and accessory. Therefore, this Court must construe the tariff term according to its current common and commercial meaning. To do so, this Court has consulted various lexicons, dictionaries and other reliable information sources for the common and commercial meaning of the term part and accessory. *Brookside Veneers*, 847 F.2d at 788.

An "accessory" is defined as "[a] part, subassembly, or assembly that contributes to the effectiveness of a piece of equipment without changing its basic function * * *." *McGraw-Hill Dictionary of Scientific and Technical Terms* 12 (4th ed. 1989); *McGraw-Hill Dictionary of Engineering* 5 (1984). These same two sources define "part" as "[an] element of a subassembly, not normally useful by itself * * *." *Dictionary of Scientific and Technical Terms* at 1374; *Dictionary of Engineering* at 416. In layman's terms, "accessory" is defined as "aiding or contributing in a secondary or subordinate way," *Webster's Third New International Dictionary, Unabridged* 11 (1981), and "part" as "an essential portion or integral element of something," *id.* at 1645.

Thus, plaintiff's burden consists of demonstrating that the V-O Cassette is an integral component of the VCR, without which the VCR could not operate in its intended capacity.

The Court finds that plaintiff has adequately overcome the presumption of correctness attached to Customs' classification of the subject merchandise under HTSUS subheading 3926.90.90 and holds that V-O Cassettes are properly classifiable under HTSUS subheading 8522.90.9080 as parts and accessories of VCRs.

Plaintiff has demonstrated that the V-O Cassette is a complex device with approximately twenty distinct components. Plaintiff's Exhibit 4, 5; *see* T.T. at 20–49. Certain of these components are highly specialized and must operate precisely as designed or the VCR will not function. T.T. at 40–41, 129–30. The door itself, for example, pushes against the internal mechanisms of the VCR and alerts the VCR that a tape has been inserted, so that the VCR may engage the cassette transport mechanism. *Id.* at 40–41. *See also id.* at 280–81 (without reference points on cassette shell, transport mechanism will not engage). The V-O cassette also contains a "window" which allows light to enter the cassette and signal the clear leader tape that the media is nearing the end. *Id.* at 155–56. Without this "window," light would not pass into the cassette, thereby hampering the function of the VCR. *Id.*

In sum, it would not be possible to operate the VCR as intended simply with media but no cassette in which to house it. T.T. at 77–78. If the V-O Cassette is defective in some way and media is inserted into that cassette, the VCR will not function properly and may become damaged. *Id.* at 67–69. *See also id.* at 198 (without a cassette there can be no tape). In order to operate the VCR in its intended fashion with media and reels, but no cassette shell, the VCR itself would have to be redesigned. *Id.* at 77. Defendant's expert witness agreed that, without the V-O Cassette housing, the VCR could not perform its function. T.T. at 281; *see also id.* at 156, 198, 280.

In light of these findings, defendant's contention that the V-O Cassette is nothing more than "spools, reels and similar supports" under Section Note 1(c) to HTSUS Section XVI is without merit. Defendant's Memorandum at 8. This Court, therefore, finds that V-O Cassettes serve a critical role in the operation of VCRs and as such are parts and accessories in both the common and commercial meanings of the word.

Conclusion

For the foregoing reasons, this Court finds that plaintiff has overcome the presumption of correctness attached to Customs' classification of the subject merchandise under subheading 3926.90.90 of the HTSUS and has demonstrated that V-O Cassettes are properly classifiable under subheading 8522.90.9080 of the HTSUS. Customs is hereby ordered to reliquidate the subject merchandise under subheading 8522.90.9080 and to refund all excess duties with interest as provided by law.

(Slip Op. 94–44)

MITSUI & CO., LTD., AND MITSUI & CO. (U.S.A.) INC., PLAINTIFFS *v.* UNITED STATES, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND FLORIDA WIRE & CABLE CO., DEFENDANT-INTERVENOR

Court No. 90–12–00633

[Plaintiffs in this case challenge the ITA's final results of the administrative review of antidumping findings. *Held:* The case is remanded in part to reevaluate plaintiffs' U.S. sales information for steel wire strand for prestressed concrete from Japan.]

(Dated March 11, 1994)

Willkie, Farr & Gallagher, (Christopher A. Dunn, Daniel L. Porter, David E. Bond) for plaintiffs Mitsui & Co. Ltd. and Mitsui & Co. (U.S.A.) Inc.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Velta A. Melnbrencis),* of counsel: *Barbara Campbell Potter,* Import Administration, U.S. Department of Commerce for defendants.

Collier, Shannon, Rill & Scott, (Paul C. Rosenthal, Kathleen Weaver Cannon, Mary T. Staley) for defendant-intervenor Florida Wire & Cable Company.

MEMORANDUM OPINION

MUSGRAVE, *Judge:* In this action, plaintiffs Mitsui & Co., Ltd. and its wholly-owned subsidiary Mitsui & Co. (U.S.A.) Inc., challenge the final results of the administrative review of antidumping findings announced by the International Trade Administration, U.S. Department of Commerce ("ITA" the "Department" or "Commerce"): *Steel Wire Strand for Prestressed Concrete From Japan; Final Results of Antidumping Duty Administrative Review,* 55 Fed. Reg. 46,853 (November 7, 1990). The review covered seven periods from 1978 to 1985, and resulted in a 15.8% antidumping duty based on best information available ("BIA"). Plaintiffs argue that the ITA did not have authority in 1987 to initiate an administrative review of plaintiffs' entries for the period April 1, 1978 to November 30, 1985 and that the ITA's decisions to conduct the administrative review and to resort to BIA and the ITA's particular choice of BIA are not supported by substantial evidence.

BACKGROUND[1]

On December 8, 1978, the U.S. Department of the Treasury ("Treasury") published an antidumping duty order on steel wire strand for prestressed concrete ("PC strand") from Japan. *Steel Wire Strand for Prestressed Concrete From Japan; Finding of Dumping,* 43 Fed.Reg. 57,599 (December 8, 1978). The government's finding stated that the Secretary had determined that PC strand, except that produced by Kawatetsu Wire Products Co., Ltd. ("Kawatetsu") was being sold at less than fair value ("LTFV") within the meaning of section 201(a) of the Antidumping Act (1921). In addition, the International Trade Commission had determined and notified the Secretary that an industry in the United States was being injured by reason of the importation of PC strand that was being sold at LTFV. As a consequence of those findings, PC strand, except that produced by Kawatetsu, became subject to antidumping duties.

Mitsui & Co., Ltd. ("Mitsui") is a Japanese trading company that exported PC strand to the United States and imported it through its wholly-owned U.S. subsidiary, Mitsui & Co. (U.S.A.) Inc. ("Mitsui USA"). Mitsui is not a manufacturer of PC strand and does not sell PC strand in Japan. Due to the nature of Mitsui's business operation, it was not investigated in the original fair value investigation conducted by the Treasury that led to the antidumping duty order on this product.

On April 24, 1979, approximately four months after the publication of the antidumping duty order on PC strand, Treasury forwarded antidumping questionnaires to Mitsui covering the period April 1, 1978 through March 31, 1979 (Period I). *Letter from U.S. Customs Service to Mitsui,* P.R. Document 44. This questionnaire instructed Mitsui to provide information on its selling prices of PC strand in both the United States and the home market. The questionnaire made clear, however,

[1]The Court quotes without attribution the uncontroverted facts in the record. Citations to documents contained in the public record of this administration review are designated "P.R.". Citations to documents contained in the confidential record of this administrative review are designated "C.R.".

that if Mitsui was an exporter that did not sell merchandise in the home market, then it need only supply general corporate information plus certain information on U.S. sales prices. *Id.* at 5. Mitsui submitted its response on May 24, 1979. *See Treasury ROI-Transmitting Mitsui Response,* C.R. Document 1, Frame 2. Mitsui received no further instructions from Treasury.

On January 1, 1980, pursuant to the Trade Agreements Act of 1979, jurisdiction over antidumping matters was transferred from the Treasury Department to Commerce. After Commerce assumed the responsibility for administering the antidumping law, it commenced administrative reviews of PC strand. On February 5, 1981, Commerce issued Mitsui a questionnaire covering the period April 1, 1979 through November 30, 1980 (Period II). *Letter from U.S. Department of Commerce to Mitsui,* P.R. Document 45. The cover letter to the questionnaire also requested additional information covering the period of Mitsui's prior submission (Period I), which Commerce found "deficient * * * in that the data reflected therein covered only inter-company transactions * * *." *Id.* On April 23, 1981, Mitsui transmitted its response to Commerce's questionnaire. *See Treasury ROI-Transmitting Mitsui Response,* C.R. Document 2, Frame 37. In this response, Mitsui provided information about its sales, but noted that the information on U.S. resales would have to be obtained from Mitsui USA. *Id.* at p. 2. The record does not indicate whether Commerce ever requested the information from Mitsui USA.

On December 18,1981, Commerce sent Mitsui an additional questionnaire, covering the period December 1, 1980 through November 30, 1981 (Period III). *Letter from U.S. Department of Commerce to Mitsui,* P.R. Document 46. The general instructions to this questionnaire state once again that if Mitsui did not sell the merchandise in the home market, it need only provide general corporate information and sales prices to the United States. There is no mention in the questionnaire of the alleged "deficiency" in the earlier response, nor did it request information on U.S. sales by Mitsui USA. On March 25, 1982, Mitsui responded to Commerce's questionnaire covering Period III. *See Treasury ROI-Transmitting Mitsui Response,* C.R. Document 3, Frame 102. Mitsui received no further word from Commerce on this response.

On May 20, 1982, Commerce issued a preliminary determination on the product covering Periods I and II. *Steel Wire Strand for Prestressed Concrete From Japan; Preliminary Results of Administrative Review of Antidumping Findings,* 47 Fed. Reg. 21,909 (May 29, 1982). This preliminary determination provided separate rates for every manufacturer from whom Mitsui had purchased PC strand. *Id.* The determination specifically identified those rates applicable to Mitsui.

On December 29, 1982, Commerce issued Mitsui another questionnaire, covering the period December 1, 1981 through November 30, 1982 (Period IV). *Letter from U.S. Department of Commerce to Mitsui,* P.R. Document 47. This questionnaire maintained that Mitsui need only

provide general corporate information and information on U.S. Sales. In the cover letter accompanying the questionnaire, there was no reference to any of Mitsui's prior antidumping responses. On March 15, 1983, Mitsui submitted its response to Commerce's questionnaire for Period IV. *See Treasury ROI-Transmitting Mitsui Response,* C.R. Document 4. Mitsui received no information from Commerce concerning the adequacy of this response.

In July of 1982, Mitsui USA pled guilty to 21 counts of conspiracy to evade antidumping duties and the Trigger Price Mechanism on various steel products, including PC strand. *See* P.R. Document 1, Frame 7. Consequently, Commerce excluded Mitsui from the final results of the administrative review covering Period I and II. *Steel Wire Strand for Prestressed Concrete From Japan; Final Results of Administrative Review of Antidumping Finding,* 48 Fed. Reg. 45,586, 45,587 (October 6, 1983). Commerce did not, however, explain how the U.S. company's guilty plea to Customs fraud related to the antidumping response.

Subsequently, Commerce submitted to Mitsui an antidumping questionnaire for the period December 1, 1982 through November 30, 1983 (Period V). No record of this questionnaire exists in the files, and none has been furnished in the administrative record, so it is not possible to determine what information was requested in that mailing. However, it is clear that such a questionnaire existed because Mitsui explicitly referred to it in its questionnaire response dated June 10, 1984. *See Treasury ROI-Transmitting Mitsui Response,* C.R. Document 5. For approximately the next three years, Mitsui heard nothing further from Commerce.

On June 17, 1987, Commerce published a notice stating that it had initiated a review of the dumping finding on PC strand with respect to Mitsui for Periods I through V. *Initiation of Antidumping Duty Administrative Reviews; Japanese Steel Wire Rope and Steel Wire Strand for Prestressed Concrete,* 52 Fed. Reg. 23,063 (June 17, 1987). According to a file memorandum, Commerce was self-initiating the review due to Mitsui USA pleading guilty to 21 counts of conspiracy to evade antidumping duties and the Trigger Price Mechanism back in July of 1982. *Memorandum to Undersecretary Regarding Self-Initiation,* P.R. Document 1, Frame 7.

On August 6, 1987, Commerce sent to Mitsui a questionnaire, requesting complete sales pricing and cost information covering the period April 1, 1978 through November 30, 1985. *Letter from Div. Dir/IA Attache to Mitsui & Co. Ltd.,* P.R. Document 5, Frame 71. The cover letter to the questionnaire stated that Mitsui need not supply sales information for those periods for which it had already supplied information. Mitsui was instructed, however, to indicate the period(s) for which it has already supplied such information and the dates on which that information was filed. *Id.* at Frame 73.

On September 11, 1987, within the 30 day period provided for a response, Mitsui responded to Commerce's questionnaire. *Letter from*

Mitsui & Co., Ltd., P.R. Document 6, Frame 125. In its response, Mitsui stated that it had provided complete responses for every review year from April 1, 1978 through November 30, 1983. Mitsui also claimed that all the PC strand that it had sold during the period December 1, 1983 to November 30, 1985 was manufactured by Kawatetsu, which was, therefore, excluded from the dumping finding. *Id.*

By letter dated November 25, 1987, Commerce requested that Mitsui provide a consolidated sales listing on computer tape for the periods April 1, 1978 through November 30, 1983 for completion of Commerce's analysis. *Letter from Div. Dir/IA to Mitsui & Co. Ltd.*, P.R. Document 7, Frame 126. In addition, Commerce sought new information concerning U.S. sales, *i.e.*, information on U.S. resales of the imported PC Strand to the first unrelated buyers in the United States. In connection with the new information, Commerce sought information relating to Mitsui as well as Mitsui USA. This request sought to elicit information on resales of PC strand to the first U.S. customer, such as, the identity of the customer, Mitsui USA's price to the customer, discounts to the customer, and commissions to unrelated agents. Commerce also requested information with respect to the parties with whom customers placed their orders, whether the terms of sale were set before or after the date of importation, and whether Mitsui or Mitsui USA granted any additional credits or rebates to U.S. customers. *Id.* at 2. The sales listing was to cover the same seven and one-half years of sales. Commerce allowed Mitsui thirty days, or until December 25, 1987, to submit the requested information. *Id.*

On January 7, 1988, Mitsui submitted a request for an extension of time of an additional sixty days to respond to Commerce's request for information. *Letter from Law Firm of Barnes, Richardson & Colburn (hereinafter "BR&C")*, P.R. Document 8, Frame 131. Mitsui's letter noted that the information requested covered more than seven years, that much of the information had previously been supplied in the course of five prior antidumping responses, and that the newly-requested information had to be obtained from numerous Mitsui USA branch offices throughout the country. *Id.* at 2.

On February 2, 1988, Commerce advised Mitsui that it would grant only a 15-day extension for submitting the requested information or until February 17, 1988. *Letter From Div. Dir./IA to Law Firm of BR&C*, P.R. Document 9, Frame 133.

On February 17, 1988, counsel for Mitsui met with Commerce Deputy Assistant Secretary for Import Administration. At that meeting, Mitsui requested a further extension of time until March 4, 1988 in order to complete the collecting of the requested information, claiming that the process was approximately 65 to 75 percent complete. *Letter From Law Firm of BR&C*, P.R. Document 10, Frame 134. This meeting was followed by a written request for an extension on February 18, 1988. *Id.* By letter dated February 29, 1988, Commerce advised Mitsui that since Commerce already granted one extension until February 17, 1988, it

would be unable to grant any additional extensions because of "strict time constraints." *Letter From Div. Dir./IA to Mitsui & Co.*, P.R. Document 11, Frame 135. The letter noted that Mitsui's complete response was due on February 17, 1988 and advised Mitsui that Commerce may base its appraisements "upon the best information available." *Id.*

On March 4, 1988, Mitsui and Mitsui USA responded to Commerce's request for production. With respect to third country sales, Mitsui stated that the data had been previously submitted. With respect to U.S. sales, Mitsui submitted a computer tape for the periods April 1, 1978 to November 30, 1983. With respect to customer orders, Mitsui allege that they were placed with Mitsui USA, which, in turn, had placed them with Mitsui. With respect to the terms of sale, the terms between Mitsui and Mitsui USA were set before the date of importation, at the time of contract, while the terms of salt with U.S. customers were set at the time of contract between Mitsui USA and the customer, which could be either before or after the time of importation. Mitsui claimed that there were no credits or rebates to U.S. customers other than those shown in the responses. *Letter From Law Firm of BR&C,* C.R. Document 6, Frame 179.

On April 26, 1988, Commerce issued its preliminary determination. *Steel Wire Strand for Prestressed Concrete from Japan: Preliminary Results of Antidumping Administrative Review,* 53 Fed. Reg. 16,180 (May 5, 1988) (hereinafter "P.C. Strand Preliminary Determination"). According to these results, Commerce determined a dumping margin for Mitsui of 15.80% *ad valorem.* This dumping margin was applicable to the periods April 1, 1978 through November 30, 1985, and was based upon BIA. The stated reasons for resorting to the BIA were as follows:

> Mitsui provided untimely and inadequate responses to the Department's questionnaires. The responses were inadequate because, despite several requests, Mitsui furnished a computer tape which omitted a large number of U.S. prices, quantities, and adjustments.

55 Fed. Reg. at 16,181.

On May 6, 1988, counsel for Mitsui submitted a request for a disclosure conference for an explanation of the reasons and methodology used in the P.C. Strand Preliminary Determination results. *Letter From Law Firm of BR&C,* P.R. Document 16, Frame 170. The disclosure conference was held on May 13, 1988. At this conference, Commerce disclosed that there were "omissions" in the data submitted by Mitsui for all of the five years covered by the review. *Transcript of Hearing,* P.R. Document 25, Frame 1038, at 12. Commerce delivered to Mitsui a printout of the data and showed counsel for Mitsui where the omissions were. *Id.* Upon reviewing this printout, counsel for Mitsui realized that while information was missing for two of the five review years, for the remaining three years there were no gaps. Mitsui contends that what Commerce had thought were gaps in the data for three of the five years were, in fact, instances where a given contract with a customer comprised multiple shipments. In those cases, the name of the customer and the size and

grade of the product were not repeated, creating the appearance of "gaps" when in fact there were none. Counsel for Mitsui brought these facts to Commerce's attention by letter dated May 31, 1988. *Letter From Law Firm of BR&C,* C.R. Document 7, Frame 839. In that submission, Mitsui also provided a copy of selected pages of printout, circled and underlined to show that the "gaps" were, in fact not gaps at all. Thereafter, counsel for Mitsui offered to meet with Commerce to review the record or answer any remaining questions relating to the computer tape. *Id.* at 2.

In addition, on May 31, 1988, Mitsui submitted an updated computer tape that further clarified and supplemented the tape submitted on March 4, 1988. The updated tape provided additional information that had been missing for two of the five periods covered. *Letter from Law Firm of BR&C,* C.R. Document 8, Frame 828.

On October 30, 1989, Commerce issued its final determination. *Steel Wire Strand for Prestressed Concrete From Japan; Final Results of Antidumping Administrative Review,* 55 Fed. Reg. 46,853 (November 7, 1990) (hereinafter "P.C. Strand Final Results"). Commerce based the dumping margin for Mitsui for all periods reviewed upon BIA, which was the highest rate from the fair value investigation. Commerce used the BIA, because the data submitted by Mitsui was deficient in many respects:

> For this review, we had to determine whether or not, or to what extent, Mitsui USA resold strand in the United States during the review periods at a net price below the price from the Japanese manufacturers to Mitsui Japan. We were unable to make this determination.
>
> We required that Mitsui provide a transactional database that clearly tied resales of Mitsui USA to purchases from the manufacturer. Mitsui provided an inadequate response to our request for reseller information. Mitsui did not explain how the invoices from Mitsui to Mitsui USA (and the strand prices shown on these invoices) related to the later resales of strand from Mitsui USA to Mitsui's U.S. customers. This deficiency existed for many of Mitsui's first period * * * and second period * * * sales. Such information was also lacking on certain third period * * * and fourth period * * * sales. Additionally, Mitsui did not provide the U.S. selling prices for many of its first and second period and for some of its third and fourth period sales. Also, for all five periods, Mitsui failed to provide various data, including the date of payment from Mitsui's U.S. customers * * *.

55 Fed. Reg. 46,583–84.

Commerce further elucidated that the computer tape submitted on March 4, 1988 by Mitsui was untimely. In addition, Commerce rejected Mitsui's characterization of the May 31, 1988 revised computer tape as "clarifying" data or "verification exhibits" because the May 1988 revised computer tape constituted new data that was untimely submitted:

> Mitsui submitted its second computer tape after we published our preliminary results, and we do not accept submissions following

publication of our preliminary results. Mitsui's second computer tape does not constitute verification exhibits or clarifying data, but rather factual data essential to our analysis of Mitsui's sales.

55 Fed. Reg. at 46,854.

STANDARD OF REVIEW

In reviewing injury, antidumping, and countervailing duty investigations and determinations, this Court must hold unlawful any determination unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1982). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) *(quoting Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229 (1938)). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm's*, 338 U.S. 607, 619–20 (1966); *See also Matsushita Electric Industrial Co. v. United States*, ____ Fed. Cir. (T) ____, ____, 750 F.2d 927, 933 (1984). Moreover, the Court may not substitute its judgment for that of the agency when the choice is between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*. *See American Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) *(citing Universal Camera, 340 U.S. at 488), Aff'd sub nom. Armco, Inc. v. United States*, ____ Fed. Cir. (T) ____, 760 F.2d 249 (1985).

Substantial evidence supporting an agency determination must be based on the whole record. *See Universal Camera Corp.*, 340 U.S. 474, 488 (1951). The "whole record" means that the Court must consider both sides of the record. It is not sufficient to examine merely the evidence that sustains the agency's conclusion. *Id.* In other words, it is not enough that the evidence supporting the agency decision is "substantial" when considered by itself. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. *Universal Camera Corp.*, 340 U.S. at 478, 488.

DISCUSSION

1. *Mitsui's Challenge to Commerce's Administrative Review for the Period April 1, 1978 through November 30 1985:*

Mitsui argues that Commerce lacked the authority to initiate an administrative review of Mitsui's sales during this period because it did not initiate the review within the deadlines established by law. Prior to 1984, Commerce was required to review automatically all antidumping duty orders on an annual basis. *See* Pub. L. No. 96–39, 93 Stat. 151, 175 (1979). In 1984, Congress amended 19 U.S.C. § 1675 so that Commerce was required to conduct an administrative review of an antidumping

duty order *only* "if a request for such a review has been received." Trade and Tariff Act of 1984 § 611, Pub. L. No. 98–573, 98 Stat. 2948 (1984).

To implement the amended section, Commerce issued interim regulations requiring that for orders published before September 1, 1983 and review periods ending before September 1, 1985, a person eligible to request an administrative review must have done so no later than October 31, 1985. 19 C.F.R. § 353.53(c)(F) (1985). Consequently, if a timely request was not filed *(i.e.,* no request was made by October 31, 1985) antidumping duties were to be assessed "at rates equal to the cash deposit of (or bond for) estimated antidumping duties required on that merchandise at the time of entry * * *." 19 C.F.R. § 353.53a(d)(1) (1985).

On June 17, 1987, Commerce initiated an administrative review of Mitsui's entries of PC strand during the period April 1, 1978 through November 30, 1985. Mitsui argues that the time limitation of 19 C.F.R. § 353.53(c)(F) precludes review of Mitsui's entries for the period April 1, 1979 through November 30, 1984, because the review was not initiated before the October 31, 1985 deadline. *Plaintiff's Memorandum In Support For Judgment Upon The Agency Record,* at 21–27.

Similarly, Mitsui argues that review of entries for the period of December 1, 1984 through November 30, 1985 is precluded because it was initiated after the anniversary month for that period of review had passed. The applicable regulations required that if Commerce initiated an administrative review, it must "no later than 10 days after the anniversary month * * * publish in the Federal Register a notice of 'Initiation of Antidumping Duty Administrative Review.'" *See* 19 C.F.R. § 353.53a(c)(1) (1985). Mitsui explains that a review must be initiated within 10 days of the anniversary month because the date of initiation and publication coincide. Because Commerce did not adhere to its regulations, Mitsui concludes that the results of the review are void. *Plaintiffs Memorandum* at 27–28.

As a threshold defense, Commerce argues that because Mitsui did not raise the issues of timeliness of initiation of the reviews before the ITA, Mitsui is precluded from doing so now. *Defendant's Memorandum In Opposition To Plaintiffs' Motion For Judgment Upon The Administrative Record* at 20 *et seq.* Commerce asserts that the statutory requirement of exhaustion of administrative remedies operates to bar the Court from considering the issue. *See* 28 U.S.C. § 2640(b) (emphasizing the legislative intent to require exhaustion of administrative remedies).

In any event, Commerce argues, the timeliness arguments are without merit. The 1985 regulations Mitsui relies upon concern requests for administrative review by interested parties, not the self-initiation that occurred here. Commerce is authorized to conduct reviews for changed circumstances as well as periodic reviews. 19 U.S.C. § 1675(b) provides:

> Whenever the administering authority * * * receives information concerning, or a request for the review of, * * * an affirmative determination * * * which shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a re-

> view after publishing notice of the review in the Federal Register * * *.

The regulation that implemented 19 U.S.C. § 1675(b) was 19 C.F.R. § 353.53(b) (1985), which contained the following pertinent language:

> Whenever the Secretary receives information concerning, or a request for the review of, an Antidumping Duty Order or Finding or an agreement on the basis of which an investigation was suspended, which shows changed circumstances sufficient to warrant a review of such Order, Finding or agreement, he shall * * * publish a "Notice of Intention to Review Antidumping Duty Order" * * * in the Federal Register * * *.

Section 353.53(b) was first published in 1985 and its contents remained unchanged until 1989, when it was revised and recodified as 19 C.F.R. § 353.22(f). Commerce asserts that the above pertinent excerpts do not specify a time period within which the Secretary of Commerce must self-initiate a review or publish a notice of initiation of review.

Commerce further argues that the 1984 amendment to the periodic review regulation, *i.e.*, 19 C.F.R. § 353.53a, does not apply to the entries affected by the final results in this case even if review was commenced under that regulation, because the investigation was completed in 1978, and the entries affected were made from April 1, 1978 through November 30, 1983. *See Interredec, Inc. v. United States*, 11 CIT 45, 652 F. Supp. 1550 (1987). According to Commerce, it had already initiated a review of the April 1, 1978 through November 30, 1983 periods before the effective date of the 1984 amendment, and simply continued the review after the self-initiation in 1987. *Defendants Memorandum* at 36.

Mitsui does not challenge Commerce's assertion that it failed to raise these arguments before the ITA. In addition, Mitsui does not dispute Commerce's arguments with respect to the statutory requirements requiring exhaustion of administrative remedies, but argues that the application of the exhaustion doctrine is discretionary, noting that 28 U.S.C. § 2637(d) states that "The Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." *Plaintiffs' Reply Memorandum*, at 21. Mitsui refers to *Hercules, Inc. v. United States*, 11 CIT 710, 735, 673 F. Supp. 454, 476 (1987), to support the proposition that "When a claim is purely legal, and does not add factual data to the record, it is within the court's discretion to consider the claim." *Id.* at 22. Alternatively, Mitsui asserts that it would have been futile to raise the arguments against initiation, because Commerce had already initiated the review. *Id.* at 24–25.

The usual statement of the exhaustion doctrine is that to preserve an issue for judicial review it must have been raised at the administrative level "at the time appropriate under the agency's] practices" *United States v. LA. Trucker Truck Lines, Inc.*, 344 U.S. 33, 37, (1952). In the instant type of action, the Court is statutorily directed to apply the exhaustion requirement "where appropriate." 28 U.S.C. § 2637(d) (1982). In light of this quoted language, Congress did not intend 28 U.S.C. § 2637(d) to be jurisdictional in nature. *United States v. Priority Prods.*,

Inc., ____, Fed. Cir. (T) ____, ____, 793 F.2d 296, 300 (1986); *Timken Co. v. United States*, 10 CIT 86, 93, 630 F. Supp. 1327, 1334 n.2 (1986); *Phillips Bros. v. United States*, 10 CIT 76, 78, 630 F. Supp. 1317, 1320, *appeal dismissed on motion of appellee*, App. No. 86–1122 (Fed. Cir. July 18, 1986). While notions of the integrity of the administrative process, as embodied in the statute, suggest that exhaustion should be the "general rule," *Allen v. Regall*, 9 CIT 615 (1985), the courts must resist inflexible applications of the doctrine—characteristic of jurisdictional rules—which frustrate the ability to apply exceptions developed to cover "exceptional cases or particular circumstances * * * where injustice might otherwise result" if it were strictly applied. *Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 134, 583 F. Supp. 607, 609 (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). In *Hormel* the Supreme Court stated:

> There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.

312 U.S. at 557.

In the *Hormel* case the Supreme Court had just issued an opinion which made the previously unraised issue determinative, therefore the Supreme Court considered the new point of law even absent administrative exhaustion.

This was also the result in *In Re Elmore*, 382 F.2d 125 (D.C. Cir. 1967), where the court found that despite failure to raise certain aspects of claims at the administrative level, remand for further proceedings was appropriate. In that case, the D.C. Circuit court made it clear that plaintiff had rights which had not been recognized previously. Other courts have recognized some flexibility in the exhaustion doctrine. *See McKart v. United States*, 395 U.S. 185, 201 (1969) (exhaustion doctrine need not be "applied blindly in every case"); *cf. Kokusai Electric Co. v. United States*, 10 CIT 166, 172, 632 F. Supp. 23, 28 (1986) (holding that neglect to raise an issue prior to the close of Commerce's investigation will not be excused absent "extraordinary circumstances"); *L.A. Trucker Truck Lines, supra*, 344 U.S. at 35 ("Appelle did not offer * * * any excuse for its failure to raise the objection * * * during the administrative proceeding. Appellee does not claim to have been misled or in any way hampered in ascertaining the facts * * *.").

While there may be exceptional cases or particular circumstances which might require a court to consider questions of law which were neither pressed nor passed upon by the agency, this case is not such a case. In contrast, there has been no interpretation of existing law after Commerce's determination, which, if applied, might have materially altered the result. Further, it appears from the facts in this case, that it would not have been futile for Mitsui to argue that the agency did not comply with its own regulations.

It is well established that the defense of failure to comply with regulations is considered an affirmative defense. *United States v. Atkinson,* 6 CIT 257, 259, 575 F. Supp. 791, 793 (1983), and cases cited therein. Rule 8(d) of the United States Court of International Trade, which is analogous to Rule 8(c) of the Federal Rules of Civil Procedure, requires a party to plead its affirmative defenses. This Court has held that failure to do so results in waiver of such defenses and their exclusion from an action. *See e.g. Manifattura Emmepi S.P.A. v. United States,* ___ CIT ____, ____, 799 F. Supp. 110, 112–113 (1992); *United States v. Atkinson, supra,* 6 CIT at 259, 575 F. Supp. at 793. If Mitsui desired to assert facts which put Commerce's failure to follow its own regulations at issue, it should have so pleaded in its answer. "In pleading to a preceding pleading, a party shall set forth affirmatively * * * illegality, laches, * * * statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense." CIT Rule 8(d). *See also Hall v. U.S. Postal Service,* 857 F.2d 1073 (6th Cir. 1988); *Little v. United States,* 794 F.2d 484, 487 n.2 (9th Cir. 1986) ("exhaustion of administrative remedies * * * must be plead in the trial court").

Plaintiffs have not provided a sufficient reason for not raising the issue at the administrative level that justifies application of an exception to the exhaustion doctrine. Therefore, the Court finds that plaintiffs are barred from raising arguments relevant to the timeliness of Commerce's review proceedings.

2. *Commerce's Decision To Review Mitsui's Shipments:*

Plaintiffs argue that the decision to review Mitsui's importations is not supported by substantial evidence or otherwise in accordance with law. As noted above, Mitsui is a trading company, and does not manufacture any of the "PC strand" at issue. All of the manufacturers that sold PC strand to Mitsui knew that it was to be exported to the United States. *Plaintiff's Memorandum* at 28–29. Therefore, Mitsui should not have been included in the administrative reviews. Plaintiffs cite, for example, *Anitfriction Bearings (other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, et al.* 56 Fed. Reg. 31,692, 31,747 (July 11, 1991):

> The Department found that all of Peer Int'l's suppliers had knowledge at the time they sold their merchandise to Peer Int'l that those sales were destined for the United States * * *. As such, the Department considers them the source of any dumping activity.

Plaintiffs' Memorandum at 30.

In accordance with this approach, Commerce has taken the position that it will not initiate an investigation of a trading company without "timely and convincing" evidence of dumping, and will not investigate middleman dumping unless the allegation can be supported by pricing or cost data. *Antidumping; Final Determination of Sales at Less Than Fair Value; Certain Forged Steel Crankshafts from Japan,* 52 Fed. Reg. 36,984, 36,985 (October 2 1987). Middleman dumping is reselling in

the United States at prices less than the trading company's cost of acquisition.

Plaintiffs argue that Commerce's decision to investigate Mitsui was not based on "timely and convincing" evidence because it was based on a memo which noted that in July 1982, Mitsui USA pled guilty to 21 counts of conspiracy to evade antidumping duties.[2] Mitsui contends that Commerce relied on this memorandum, which refers to unspecified newspaper accounts, and failed to examine any relevant cost and price data for the review periods. Further, Mitsui asserts that the data supplied by it would have demonstrated that Mitsui resold the subject merchandise to its United States subsidiary at prices higher than its acquisition cost. *Plaintiffs Memorandum* at 31–32.

Commerce replies that Mitsui failed to raise this issue administratively as well. Commerce notes that during the administrative proceeding, Mitsui never questioned Commerce's stated reasons for self-initiating the reviews or the underlying facts, Commerce's conduct of a "middleman" inquiry with respect to Mitsui, or Commerce's references to Mitsui's guilty plea.[3] *Defendant's Memorandum,* at 41. Commerce points out that in its pre-hearing brief before the ITA, Mitsui stated that it "does not take issue herein with Commerce's 'middleman' inquiry in general." P.R. Document 22, at 15–16. Mitsui did argue, however, that if the resale data revealed no sales at less than acquisition cost, Mitsui's margin should be based upon a purchase price calculation, for which all data was allegedly in Commerce's possession. *Id.* at 16.

Commerce states that it relies on purchase price calculations rather than exporter's sales price only when "[t]here is nothing in the record to indicate that the middleman is an agent of the exporter," which is not the situation. *Final Determination of Sales at Less Than Fair Value; Acetylsalicylic Acid (Aspirin) from Turkey,* 52 Fed. Reg. 24,492, 24,493 (July 1, 1987). Further, Mitsui points to nothing in the record that indicates its producers knew that the PC strand would be exported to the United States. *Defendant's Memorandum* at 39.

Mitsui responds that Commerce did have evidence in 1987 that Mitsui's suppliers knew that the merchandise would be exported to the U.S. because each had been assigned its own dumping rate in the 1978 dumping order, which would not have occurred if they did not know that the merchandise sold to trading companies was bound for the U.S. *Plaintiffs' Reply Memorandum,* at 27. Further, Mitsui argues that the guilty plea evidence was not the only reasonably available evidence since Mit-

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[2]Commerce's 1987 decision to investigate Mitsui was based solely on an undated page and a half memorandum from Gilbert B. Kaplan, Deputy Assistant Secretary for Import Administration, which noted unspecified "newspaper accounts" stating that "in July 1982 Mitsui pleaded guilty to 21 counts of conspiracy to evade antidumping duties and the Trigger Price Mechanism on various steel products." *Memorandum to Undersecretary Regarding Self-Initiation,* P.R. Document 1, Frame 7.

[3]Although Mitsui refers to the evidence of Mitsui USA's guilty plea as "unspecified newspaper accounts," Commerce points out that Mitsui never administratively questioned the ITA's stated reasons for initiating the reviews or the underlying facts. At a hearing on June 9, 1988, Mitsui's counsel admitted that "in the summer of 1982 Mitsui USA pled guilty to * * * a criminal investigation undertaken by the Customs Service involving imported steel," and characterized the investigation as a "fraud" investigation. P.R. Document 25, at 8 and 29.

sui had responded to 5 questionnaires respecting the subject merchandise prior to the initiation of this review. *Id.* at 28.

While Commerce does normally require "timely and convincing" evidence of dumping before initiating an investigation of a trading company, that evidence need only be that which is "reasonably available" to Commerce. *Preliminary Determination of Sales at Less Than Fair Value; Certain Stainless Steel Cooking Ware from the Republic of Korea,* 51 Fed. Reg. 24,563, 24,564 (July 7, 1986). Commerce contends that the "reasonably available" evidence here was Mitsui USA's plea of guilty to 21 counts of conspiracy to evade antidumping duties using kickbacks, credits, and secret rebates. *Defendants Memorandum,* at 39–41. If there were kickbacks, credits or secret rebates, the price information previously submitted would not disclose middleman dumping. Therefore, Commerce concludes the facts are sufficient to support the review. *Id.* at 42.

There is no evidence in the record indicating when Commerce took notice of the "newspaper accounts" stating that "in July 1982 Mitsui pleaded to 21 counts of conspiracy to evade antidumping duties * * *." *See* P.R. Document 1, Frame 7. Since Commerce used this information to base its decision to review, the Court will deem that Commerce took notice of the newspaper articles at the time of publication. If indeed, Commerce knew about these newspaper articles in 1982, *i.e.* if they were published then, and Commerce did nothing about it until 1987, then the review raises serious concerns of fundamental fairness and due process. However, the Court need not resolve these issues since Mitsui waived its rights by acquiesing to the "middleman" review at the administrative level.

3. *Commerce's Decision to Calculate a Dumping Margin Based on Best Information Available:*

In addition to arguing that Commerce's review is timebarred, Mitsui also contends that the decision to resort to BIA was not supported by substantial evidence. Commerce asserts four deficiencies in Mitsui's submissions as a basis for resorting to BIA: 1) Mitsui's failure to explain how invoices from Mitsui to Mitsui USA related to later resales of PC strand from Mitsui USA to unrelated U.S. customers; 2) Mitsui did not provide the U.S. selling prices for some sales from the I, II, III, and IV periods; 3) Mitsui failed to provide the date it received payment from U.S. customers, and; 4) Mitsui's computer tapes were untimely submitted.

It is firmly established that "whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, [the ITA shall] use the best information otherwise available."

See 19 U.S.C. § 1677e(c) (1993 Supp.);[4] *see also Allied-Signal Aerospace Co. v. United States,* ___ Fed. Cir. (T) ___, ___, 996 F.2d 1185, 1190 (1993); *Technoimportexport v. United States,* 15 CIT 250, 257, 766 F. Supp. 1169, 1176 (1991); *N.A.R., S.p.A. v. United States,* 14 CIT 409 414, 741 F. Supp. 936, 941 (1990). The ability of the agency to set and enforce its own deadlines is an area well within its discretion,[5] and a party has an obligation to file by ITA deadlines or to obtain extensions of time. The law does not permit a party to pick and choose information it wishes to present to the agency, and a deficient submission may lead to an undesired result. *See N.A.R., S.p.A.,* 14 CIT at 415, 741 F. Supp. at 941. Nonetheless, the regulations in effect during the underlying proceeding reflected the statute's preference that determinations be based on the respondent's actual information. 19 C.F.R. § 353.51(b) (1988) offered an

> opportunity to correct inadequate submissions * * * if the correct submission is received in time to permit proper analysis and verification of the information concerned; otherwise no corrected submission will be taken into account.

As to the first deficiency, Mitsui counters that Commerce never specifically requested information on how invoices from Mitsui related to invoices to U.S. customers, and that nothing in the record indicates that Commerce could not understand this relationship from Mitsui's submissions—which it claims was obvious from Mitsui's computer printouts. *Plaintiffs' Memorandum,* at 40. Moreover, Mitsui argues that the only information relevant to dumping was the price at which the supplier sold the subject merchandise to Mitsui and the price at which Mitsui USA sold to the U.S. customers. The invoice prices from Mitsui to Mitsui USA is irrelevant. *Id.* at 41.

Although Commerce argues that it may not have specifically requested that Mitsui explain the relation between invoices, had Mitsui provided the requested information, Commerce would have possessed the information needed to provide the necessary linkage between Mitsui's purchases of PC strand from its suppliers, the sales of those purchases to Mitsui USA, and their subsequent resale to Mitsui USA's U.S. customer. Because Mitsui did not supply all the requested information, Commerce was unable to trace Mitsui's purchases to resales in the United States and determine whether or not Mitsui USA was selling PC strand in the United States at prices below Mitsui's acquisition costs for the PC strand. *Defendant's Memorandum* at 48–49.

It is axiomatic that Commerce may not resort to BIA because of an alleged failure to provide further explanation when that additional explanation was never requested. *See Olympic Adhesives, Inc. v. United States,* ___ Fed. Cir. (T) ___, ___, 899 F.2d 1565, 1574 (1990). Com-

[4] **(c) Determination to be made on best information available**
In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produceÿ20information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

[5] *See, e.g. Rhone Poulenc, Inc. v. Unites States,* 13 CIT 218, 710 F. Supp. 341 (1989), *aff'd* ___ Fed. Cir. (T) ___, 899 F.2d 1185 (1990).

merce suggests that Mitsui should have made efforts apart from the questionnaires to explain how the invoices from Mitsui related to invoices to U.S. customers. However, 19 U.S.C. § 1677e(c) does not place that obligation on the submitter. To avoid the threat of 19 U.S.C. § 1677e(c), a submitter need only provide complete answers to the questions presented in an information request. The Court finds that Commerce's conclusion that Mitsui failed to provide an explanation of how invoices from Mitsui to Mitsui USA correspond to sales to Mitsui's U.S. customers does not support the resort to BIA.

As to the second deficiency, Mitsui asserts that it did provide U.S. selling prices for some periods. Mitsui admits that the first computer tape they submitted contained omissions, but only in the first two periods. Mitsui asserts that the omissions were corrected on a second tape. Commerce did not accept the second tape because it was submitted after the preliminary results were published. The alleged omissions in the third and fourth periods were merely errors in interpretation by Commerce because where multiple shipments were made under one contract, the customer and product were not repeated on the tape, thus, creating the appearance of a gap. *Plaintiffs Memorandum* at 42–43.

Despite Mitsui's claim to the contrary, Commerce maintains that a sample page contained in *Defendant's Confidential Appendix Exhibit 1 ("Exhibit 1")* reveals that Mitsui failed to provide requested information for some III and IV period sales. Mitsui did not claim that fields containing a "dot" or "decimal points" were "ditto" marks until after the disclosure conference, and no such explanation accompanied the tape. Further, the computer tape was accompanied by instructions, which indicate that the code "IP" specifies those instances in which the quantity or amount has been included in a previous line. The instructions contain no statement that the "dots" are intended to have the same function as the code "IP."[6] Thus, Commerce asserts that the use of a "dot" in a subsequent observation could only have indicated to Commerce the absence of information. The "dots" could not represent to Commerce subsequent shipments against a multi-shipment order. *Defendant's Memorandum* at 51.

Mitsui asserts that Commerce's criticisms of its tape are wrong, and that it did explain that some identical information is not repeated in its May 31, 1988, submission. Mitsui's May 31st submissions make clear that there are, in fact, two instances where identical data is not repeated: (1) where multiple shipments are involved (explained in the May 31 explanation letter), and (2) where individual shipments are involved (explained in the field descriptions accompanying both the March 4th and May 31st computer tapes).

The example highlighted by Commerce to criticize the May 31st explanation regarding multiple shipment data, *Exhibit 1,* does not in fact involve shipment. Instead, the *Exhibit 1* example shows an instance

[6] *See Exhibit 2* included in the confidential appendix to *Defendants Memorandum* for a copy of pertinent excerpts from the instruction.

where, in individual shipments, repeated data is noted by use of the "IP" symbol. The "IP" symbol was fully explained in the field descriptions provided with both the March 4th and May 31st computer tapes. *See Defendant's Confidential Appendix Exhibit 2.* In addition, the "dots" and "O's" appearing in the Purchase Quantity, FOB Amount, and CIF Amount Fields for the records Commerce highlighted, are each accompanied by IP in the corresponding "unit" fields exactly as explained in the instructions. *Plaintiff's Reply Memorandum* at 15.

The first time that any of these alleged deficiencies were identified for Mitsui was at the disclosure conference following the preliminary determination. At no time during the investigation did Commerce issue to Mitsui deficiency letters indicating problems with its responses. Commerce simply may not resort to BIA based on a practice of not accepting corrections after a certain date, when Commerce did not inform respondent of any deficiencies until after that date. *See Daewoo Electronics Co. Ltd. v. United States,* 13 CIT 253, 267, 712 F. Supp. 931, 945–946 (1989). The Court will not penalize Mitsui for Commerce's failure to understand Mitsui's reasonable instructions, especially when Commerce did not indicate any difficulty with those instructions or seek clarification of same. Commerce has failed to demonstrate how these submissions were inadequate. The Court finds that Commerce's determination that U.S. selling prices were not provided is unsupported by substantial evidence.

As to the third deficiency, Mitsui argues that the language of the questionnaire implies that the requested date of payment information was optional, and that its omission is therefore not grounds to resort to BIA. The questionnaire requested the dates "if known." *Plaintiffs Memorandum,* at 45. Mitsui does not indicate that the dates were in fact not known. Given the notation "if known", Commerce cannot resort to BIA because Mitsui did not provide the dates it received payment from its U.S. customers. This rationale does not provide justification for resorting to BIA. Commerce's reliance on missing payment dates as the rationale to resort to BIA is unsupported by substantial evidence.

As to the fourth deficiency, that the tapes were untimely submitted, Mitsui provides a chronology. *Plaintiffs' Memorandum,* at 46–48. The salient points of the chronology are addressed in the "Background" section of this Opinion. Mitsui argues that the long delay in initiating the reviews, the consolidation of several periods into one review, and other procedures made the reviews unfair to Mitsui. *Id.* at 50–51. Mitsui notes that despite the extraordinary nature and the vast scope of Commerce's requests, it cooperated to the best of its abilities throughout the fact finding process.

Commerce does not dispute Mitsui's chronology, but maintains that from the outset Commerce requested information that Mitsui had not previously provided, and, that Mitsui did not comply with the requests in a timely fashion. Commerce details at some length what was sought in each request and what Mitsui failed to provide. *Defendants Memorandum* at 45–47 *(See* Particularly n.14 at 46).

Commerce maintains that Mitsui had a meaningful opportunity to respond since it was given until February 17, 1988 to comply. The fact that Mitsui cooperated with Commerce does not render the decision to use BIA unjustified. There is no requirement that Commerce find any wrongdoing on the part of a noncomplying respondent before Commerce can resort to the use of BIA. *See Rhone Poulenc v. United States*, ____ Fed. Cir. (T) ____, ____, 899 F.2d 1185, 1190 (1990). Resort to BIA is justified whether noncompliance is "due to refusal or inability." *See Olympic Adhesives, supra,* at 1574.

Additionally, Commerce claims that partial use of BIA here was not an option because of the nature of "middleman" dumping. Commerce was unable to tell from the information supplied whether or not and to what extent Mitsui was dumping from partial data. *Defendant's Memorandum* at 53.

Plaintiffs assert that the issues in this case come down to a question of fundamental fairness. Mitsui argues that it was not provided with a reasonable and meaningful opportunity to respond. Mitsui points out that in a normal review covering one immediately preceding year, a respondent is given 45 days to submit a questionnaire response, and often 15 additional days on request. *Plaintiffs' Reply Memorandum,* at 10. In this case, Mitsui was given a total of 83 days to provide 5 years of information, some of which was almost 10 years old. *Id.* at 9. Commerce's refusal to grant an extension of time until March 4, 1988, under the circumstances, was unreasonable. *Id.* at 10. The fact that the March 4, 1988 response was inadequate does not justify the use of BIA, Mitsui continues, because plaintiffs did not receive any notice of deficiencies or an meaningful opportunity to correct them, and Mitsui subsequently corrected them on its own initiative on May 31, 1988. *Id.* at 11.

Whereas there is no law or regulation requiring deficiency letters, the parties must be given a reasonable and meaningful opportunity to participate in the review and provide complete responses. *See Daewoo, infra*. In extraordinary cases such as the one at bar, Commerce should have anticipated substantial difficulty in obtaining timely cogent information. A reasonable and meaningful opportunity would have included extensions of time proportional to the additional annual periods requested and some indication of whether the information submitted satisfied the criteria for Commerce's analysis. No party is as well placed as Commerce to know what information is required for the methodology it chooses in any particular review. This special knowledge imposes on Commerce an obligation to reasonably insure that the subject of the investigation is informed as to those requirements.

In *Daewoo Electronics Co. Ltd. v. United States,* 13 CIT 253, 712 F. Supp 931 (1989), this Court found that Commerce's procedure was the root cause of the absence or untimeliness of information. In that case, foreign manufacturers and exporters challenged Commerce's decision to use BIA to calculate certain adjustments in a administrative review which Commerce had decided to conduct on an expedited basis.

According to Commerce, it was justified in using BIA because a computer tape from one of the respondents was untimely submitted and not in the right format. The tape had been submitted three weeks beyond the deadline and four weeks before the final determination and was not formatted properly. The Court ruled that under these circumstances, it could not uphold the use of BIA. The Court noted, "[i]n the process of expediting the administrative review * * * Commerce has curtailed normal procedural safeguards of this administrative review proceeding." *Daewoo,* 13 CIT at 267, 712 F. Supp. at 946. Further, the Court held that unusual procedures used by Commerce "failed to avail plaintiff of an opportunity to provide timely and complete responses * * *." *Daewoo,* 13 CIT at 267, 712 F. Supp. at 945. Finally, the Court remanded with orders that Commerce "provide plaintiffs with a meaningful opportunity to participate in the review." *Daewoo,* 13 CIT at 267, 712 F. Supp. at 946.

In this case, Commerce did not resort to BIA in order to insure compliance with its statutory deadlines, but attempted to complete this premature review within self-imposed deadlines adopted uniquely for the purposes of this review. The record reflects that plaintiffs attempted, in good faith, to cooperate in this extraordinary review. Moreover, the record indicates that Commerce failed to provide clear instructions as to the methods of compiling the information. Before Commerce may find any non-compliance on the parties to the proceeding, there must be a clear and adequate communication requesting the information, which is absent in this case. *Daewoo,* 13 CIT at 266, 712 F. Supp. at 945. Mitsui was not given an reasonable or meaningful opportunity to revise its original submission, consequently, Commerce has failed to avail Mitsui of an opportunity to provide timely and complete responses.

Upon due consideration, the Court finds that Commerce did not apply reasonable procedures in its attempt to solicit and clarify information from Mitsui in this extraordinary review, spanning seven review periods, some of which dated back almost ten years. Accordingly, Commerce's determination to resort to BIA was not in accordance with law. Since the Court remands this matter to Commerce for consideration of the information submitted by Mitsui specified below, it is premature to rule on the actual antidumping duty rate chosen as BIA, which is also in dispute.

Conclusion

For the foregoing reasons, this case is remanded in part to the ITA. The Court finds that plaintiffs' March 4, and May 31, 1988 tapes of U.S. sales information for steel wire strand for prestressed concrete from Japan were improperly withheld from the administrative record. On remand, the ITA is ordered to reevaluate its findings in light of these additions. The ITA shall report its remand results to this Court within 90 days and include, therein, a discussion of the relevancy of these additions. The parties shall have 45 days to file comments on the ITA's remand results.

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C94/19 3/11/94 Aquilino, J.	Erika Inc. Medical Products Division of National Medical Care, Inc.	90–09–00456	709.17 & 9018.90.70203 (depending upon the date of entry) 4.2%	870.67 or 9817.00.96 (depending upon the date of entry) Duty free	Sec. 24.23 of the C.R. Sec. 58C(8)(B) Title 19 U.S.C. (Sec. 9501 of P.L. 100–203)	Newark and Kennedy Dialyzers for use in hemodialysis manufactured and exported from Ireland in 1986, 1987, and 1989

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